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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The deadlines for objecting to a debtor's discharge in bankruptcy are set by Bankruptcy Rule 4004. The Fifth, Tenth and Eleventh Circuits and a majority of the district and bankruptcy courts hold that the deadlines for objecting to discharge are jurisdictional and cannot be waived. On the other hand, the Second, Fourth and Seventh Circuits and a minority of district and bankruptcy courts follow the view that such time limits are not jurisdictional and may be waived. Thus, the question presented is whether the deadlines established by the bankruptcy rules for objecting to discharge are jurisdictional.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals below holding that the time limits set by Bankruptcy Rule 4004 are not jurisdictional is reported as *Ryan v. Kontrick*, 295 F.3d 724 (7th Cir. 2002). The decision is reprinted in the attached Appendix (App. 1a-23a).

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on July 8, 2002. Petitioner timely filed a petition for rehearing and for rehearing en banc on July 22, 2002, which was denied on August 27, 2002. App. at 24. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

The district court below had jurisdiction to hear an appeal from the bankruptcy court under 28 U.S.C. § 158(a)(1). The bankruptcy court below had jurisdiction to enter a final judgment in a proceeding arising under Title 11. 28 U.S.C. § 157(b)(1) and (2)(J).

BANKRUPTCY RULE AT ISSUE

The opinion of the court below deals with Bankruptcy Rule 4004. The rule states in relevant part:

> (a) . . . [A] complaint objecting to the debtor's discharge under § 727 of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors . . . .
>
> (b) . . . [T]he court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

STATEMENT OF THE CASE

A. The Bankruptcy Court Followed the Minority Line of Cases That Rule 4004 Is Not Jurisdictional

Petitioner, Andrew Kontrick (Kontrick) filed a bankruptcy petition in April 1997. App. at 1. Based on Bankruptcy Rule 4004, any objection to Kontrick receiving a discharge in bankruptcy had to be filed within 60 days of the first meeting of creditors, unless the bankruptcy court extended that time. In this case, the bankruptcy court extended the deadline to January 13, 1998. App. at 3. On that date, the respondent, Robert Ryan (Ryan), filed a complaint objecting to discharge. *Id.* In particular, Ryan alleged that Kontrick made certain transfers of property within one year of bankruptcy with an intent to defraud and as such should forfeit his discharge under section 727(a)(2) of the Bankruptcy Code. 11 U.S.C. § 727(a)(2).

Almost four months after the deadline for objections to discharge had passed, Ryan filed an amended complaint alleging a new objection to discharge. App. at 4. In the amended complaint, Ryan alleged that Kontrick's deposits of his salary to an account in his wife's name was an additional ground to deny him a discharge ("family account claim"). *Id.* Kontrick filed an answer denying liability, but did not raise that this new claim was filed beyond the Rule 4004 deadline. App. at 4.

The respondent filed a motion for summary judgment. *Id.* This motion contained numerous allegations and what the bankruptcy court described as a "myriad of documents to support the motion, much of which was doomed to failure." *Id.* at 65. The bankruptcy court also found, in response to Kontrick's objections, that many of these allegations were untimely. *Id.* at 47-48. The court then denied the motion on all

grounds, except one—the family account claim that was filed after the deadline. *Id.* at 55; 64. On that ground alone, it granted summary judgment and denied Kontrick's discharge. *Id.*

Kontrick moved to reconsider and pointed out that in opposing the many other allegations as untimely, he had also raised that the family account claim was filed after the deadline. App. at 71. After acknowledging contrary authority, the bankruptcy court held that the Rule 4004 deadline was not jurisdictional, and that Kontrick had not sufficiently preserved an objection to the timeliness of the claim. *Id.* The court also held that the issue could not be raised in a motion for reconsideration and, as a result, deemed it "waived." *Id.* at 31. *Id.* at 72.

B. The District Court and Court of Appeals Also Followed the Minority Rule

Kontrick appealed to the district court and argued that the majority of courts have held that the deadline set by Rule 4004 is jurisdictional and cannot be waived. App. at 29. The district court noted that courts were divided on the issue. *Id.* at 30-31. It then rejected the majority rule and followed a minority line of cases holding that Rule 4004 is not jurisdictional and affirmed the bankruptcy court. App. at 31-32.

On appeal to the Seventh Circuit, petitioner again urged the court to follow the majority line holding that the Rule 4004 time limit is jurisdictional. The Seventh Circuit also rejected the majority rule. App. at 14. At the outset of its opinion, the court acknowledged the split of authority. *Id.* at 7-8. It also noted that the principal case Kontrick relied on was a "thoughtful effort," discussed it at length, but rejected it. *Id.* at 9. The court then sided with the minority line and found that the deadline was not jurisdictional. *Id.*

at 14. The court also rejected Kontrick's argument on the merits and affirmed the district court. *Id.* at 22-23.

REASONS FOR GRANTING THE WRIT

A. There Is a Direct Conflict Among the Circuits as to Whether Rule 4004 Is Jurisdictional

1. The Fifth, Tenth and Eleventh Circuits Hold That Rule 4004 Is Jurisdictional

The discharge a debtor receives in bankruptcy—often referred to as a "fresh start"—is one of the fundamentals of bankruptcy law. To promote a debtor's fresh start, Rule 4004 sets a relatively short time for filing objections to discharge—60 days from the first meeting of creditors or as extended by the court. *See In re Ham*, 174 B.R. 104, 107 (Bankr. S.D. Ill. 1994) (the short period for objecting to discharge is "intended to protect the debtor's fresh start"). Thus, the rules governing objections to discharge play a key role in the proper functioning of the bankruptcy system. And the importance of a *uniform* system of bankruptcy laws is as old as the Constitution. *See* U.S. Constitution, art. I, § 8, [4] ("Congress shall have Power ... to establish ... Uniform Laws on the subject of Bankruptcies throughout the United States").

In this case, the court below made a passing comment that there is "unanimity" among the other circuits that the deadlines for objecting to discharge are not jurisdictional. App. at 7. That comment is not correct. In fact, the recent decision in *In re Rowland*, 275 B.R. 209 (Bankr. E.D. Pa. 2002) shows in detail why the circuits are anything but "unanimous."

In *Rowland*, the court thoroughly examined the current state of the law as to whether these deadlines are jurisdictional. In doing so, the court considered the virtually identical Bankruptcy Rule 4007 governing ob-

jections to the discharge of a particular debt,[1] and then specifically identified the Fifth, Tenth and Eleventh Circuits as adhering to the jurisdictional view:

> Finally, there is a third line of cases which holds that Rule 4007(c) is jurisdictional. *See First National Bank in Okeenee v. Barnes*, 956 F.2d 277 (Table, Text in Westlaw), unpublished disposition, 1992 WL 33251 *1 (10th Cir. 1992) (finding Rule 4007(c) to be jurisdictional); *Neely v. Murchisen*, 815 F.2d 345, 347 (5th Cir. 1987) (finding that Rule 4007 sets a fixed limitation period of sixty days and further constrains the granting of extensions); *In re Alton*, 837 F.2d 457, 459 (11th Cir. 1988) (finding that Rule 4007(e) is mandatory and does not allow the court any discretion to grant a late-filed motion for extension).

275 B.R. at 213.

These three decisions from the Fifth, Tenth and Eleventh Circuits cited in *Rowland* each follow the jurisdictional view. In *Neely*, the Fifth Circuit found that the time set by Rule 4007 was fixed and could only be extended by a motion filed before the 60-day time limit expired. 815 F.2d at 346. Thus, it held that an objection filed ten days after the deadline was untimely, even though the clerk erroneously informed the creditor that no deadline was set. *Id.*

Similarly, the Eleventh Circuit in the *Alton* case relied on the Fifth Circuit's decision in *Neely* and held that the Rule 4007 deadline was "mandatory" and the

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[1] Objections to a general discharge are governed by Rule 4004, and objections to the discharge of a particular debt are governed by Rule 4007. The court below found that "[be]cause the two rules were almost identical, it is appropriate to consider decisions construing Rule 4007(c) as well as 4004(a)." App. at 8, n.3.

lower court had no discretion to grant a late-filed motion to extend the time. 847 F.2d at 458. Later, in *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994), the Eleventh Circuit referred to the deadline in Rule 4004 as a "jurisdictional requirement" and a "jurisdictional bar" when considering when a complaint is filed. *Id.* at 1450-51. Finally, in *Barnes*, the Tenth Circuit relied on the Fifth and Eleventh Circuits' decisions in *Neely* and *Alton* to hold that a creditor could not add a new objection after the deadline had passed. The Tenth Circuit held: "[w]e agree that the Rule 4007(c) filing requirements are jurisdictional." *Id.* * 1.[2]

2. The Second, Fourth and Seventh Circuits Follow the Non-Jurisdictional View

The Second Circuit adopted the non-jurisdictional view in *In re Benedict*, 90 F.3d 50 (2d Cir. 1996). In *Benedict*, the court first recognized that courts are "divided" on the issue. *Id.* at 53-54. It then reviewed a line of cases holding that the time limit is jurisdictional. *Id.* It also noted another line of cases which do not reach the jurisdictional issue, but still allow late filings if the objector was "misled" by the court. After considering this authority, it decided to follow a "third" line of cases holding that the time period is not jurisdictional because, according to the Second Circuit, "the time limits in Rule 4007 were just another statutory deadline that would be subject to waiver, estoppel or equitable tolling." *Id.* at 54.

The Fourth Circuit also considered the split of authority in *Farouki v. Emirates Bank Int'l. Ltd.*, 14 F.3d 244 (4th Cir. 1994). In *Farouki*, the court recognized that

[2] Under the Tenth Circuit's rules, an unpublished opinion, though not binding precedent, may (unlike other circuits) still be cited if it has "persuasive value" on an issue not already addressed in a published opinion and it would assist the court. 10th Cir. R. 36.3(B).

decisions such as *In re Barley*, 130 B.R. 66, 68 (Bankr. N.D. Ind. 1991) hold that the time limit is a "jurisdictional prerequisite." However, the Fourth Circuit rejected that view in favor of a decision of the Ninth Circuit bankruptcy appellate panel in *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990), finding it more "well reasoned." The *Santos* decision held that the time limit could be extended based on "equitable" considerations. *Id.* at 1006-08.

The court below also recognized the division of authority over whether the time for objecting to discharge is jurisdictional. App. at 7-8. Its opinion contains an extended discussion of a decision many courts have followed over the past 16 years—*In re Kirsch*, 65 B.R. 297 (Bankr. N.D. Ill. 1986). *Id.* at 9-11. In *Kirsch*, the court found that the deadline in Rule 4007 is "set in stone" and, based on the express language of another bankruptcy rule, Rule 9006(b), may only be extended "by a motion filed before the Rule 4007(c) time expires." *Id.* at 301. The court in *Kirsch* also relied on the fact that Rule 9006(b) is "modeled" after Fed. R. Civ. P. 6(b), which limits the enlargement of time for certain post-trial motions only to the extent expressly stated in the rules. Since the time limits for such post-trial motions are considered jurisdictional, the court in *Kirsch* held that Rule 4007 was also jurisdictional and could not be waived:

> This interpretation ... accords with the general rule that discharge and dischargeability law and procedure is to be interpreted strictly against creditors and in favor of debtors to promote a debtor's fresh start.

Id. at 302.

The Seventh Circuit found that the *Kirsch* decision provided a "thoughtful effort." App. at 9. However, it still rejected the *Kirsch* line of cases in favor of

what it called "policy concerns that animate the bankruptcy rules at issue." *Id.* at 10. In doing so, the court attempted to distinguish *Kirsch* solely on the basis that the deadlines set by Rule 6(b) for post-trial motions were necessary to prevent "uncertainty" *after* judgment, while the deadlines set by the bankruptcy rules involved deadlines *before* judgment. *Id.* at 10-11. Yet the court cited no authority for why postjudgment deadlines had a greater significance than prejudgment deadlines. It also did not explain why the certainty promoted by the bankruptcy rules is less important than the deadlines for post-trial motions.

After its attempt to distinguish *Kirsch*, the court concluded it would also follow the bankruptcy appellate panel's decision in *Santos*, stating: "[W]e join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions at issue are not jurisdictional." *Id.* at 14. And, as such, there exists a direct conflict between the Fifth, Tenth and Eleventh Circuits which follow the jurisdictional view, and the Second, Fourth and Seventh Circuits which do not.

B. The Split of Authority Among the Circuits Is Even More Compelling Because of the Ongoing and Widespread Conflict Between the District and Bankruptcy Courts.

This division of opinion among the circuits is all the more significant because the district and bankruptcy courts continue to struggle with this issue on a regular basis and have produced sharply divergent views. In what is often referred to as the "majority," courts have held that the deadlines for objecting to discharge are "jurisdictional." *See, e.g., In re Rinde*, 276 B.R. 330, 333 (D. R.I. 2002) (court adopts jurisdictional view taken by the "majority of courts that have addressed this question"); *In re Lufkin*, 256 B.R. 876, 879 (Bankr. E.D. Tenn. 2000) ("The majority of courts, however,

treat the time limit of Rule 4007(c) as a jurisdictional requirement"); *In re Goodwin*, 215 B.R. 710, 714 (Bankr. W.D. Tenn. 1997) ("majority of courts" have determined that time limit is jurisdictional); *In re Glover*, 212 B.R. 860, 861 (Bankr. S.D. Ohio 1997) ("majority" adhere to jurisdictional view); *In re Ham*, 174 B.R. at 107, n.4 (jurisdictional view "represents the majority of courts" citing *Neely* and *Alton*); *In re Booth*, 103 B.R. 800, 801 (Bankr. S.D. Miss. 1989) ("majority of courts" disagree that deadline may be waived).

The depth and breadth of this division of authority may be seen by a brief survey of the state of the law in each circuit.

First Circuit – The First Circuit has made no definitive ruling on this issue. However, the most recent ruling from this circuit follows the jurisdictional view. *See Rinde*, 276 B.R. at 333 (court adopts jurisdictional view, citing seven other decisions in support). Yet another court within the First Circuit takes the opposite view. *In re Walker*, 195 B.R. 187, 204 (Bankr. D. N.H. 1996) (Rule 4007 is not jurisdictional).

Second Circuit – Based on its decision in *Benedict*, the Second Circuit is in the non-jurisdictional camp. Yet *Benedict* itself has recently been singled out for criticism as representing the "minority view." *Lufkin*, 256 B.R. at 879.

Third Circuit – The Third Circuit also has not made a conclusive ruling on whether Rules 4004 and 4007 are jurisdictional. However, the most recent decision from the Third Circuit in *Rowland* contains a detailed analysis of the state of the law and comes down solidly on the side of the jurisdictional view: "We believe that the Third Circuit would interpret Rule 4007(c) similarly, and we hold here that the deadline in that rule is jurisdictional." 275 B.R. at 215. Also, in *In re Poskaner*, 146 B.R. 125, 131 (D. N.J. 1992), the district

court held that the rule is jurisdictional and its opinion has been cited frequently in support of that view. *See, e.g., Rinde*, 276 B.R. at 333 (court states that it "adopts the jurisdictional view taken by *Poskanzer* and the majority of courts that have addressed this question").

Fourth Circuit – As shown above, the Fourth Circuit follows the non-jurisdictional view. *Farouki*, 14 F.3d at 247.

Fifth Circuit – As shown above, the Fifth Circuit follows the jurisdictional view. *Neely*, 815 F.2d at 346; *see also In re Thomas*, 203 B.R. 64, 67 (Bankr. S.D. Tex 1996) (court holds it is "without jurisdiction" to consider untimely objection to discharge).

Sixth Circuit – The Sixth Circuit itself has not made a definitive ruling on the issue. However, recently in *In re Leet*, 274 B.R. 695 (B.A.P. 6th Cir. 2002), the bankruptcy appellate panel for the Sixth Circuit held in favor of the jurisdictional view. In *Leet*, the panel also noted the division of authority within the lower courts of the Sixth Circuit. For example, in *In re Begue*, 176 B.R. 801 (Bankr. N.D. Ohio 1995) the court treated the deadline as a statute of limitation that could be waived. However, the court in *Leet* found that "most of these courts [in the Sixth Circuit] agree with the majority rule that the time limits in Rule 4007(c) are jurisdictional." 274 B.R. at 697.

Seventh Circuit – Until this case, the prevailing view of the lower courts in the Seventh Circuit was that the deadlines are jurisdictional. *Kirsch*, 65 B.R. at 302; *Ham*, 174 B.R. at 106-07 (court dismisses untimely complaint "for lack of jurisdiction" citing *Kirsch*); *Barley*, 130 B.R. at 69 (court expressly rejects *Santos*: "A timely complaint is a jurisdictional prerequisite"); *In re Krause*, 114 B.R. 582, 605 (Bankr. N.D. Ind. 1988) ("the deadlines set by the Bankruptcy Rules are jurisdictional").

Eighth Circuit – The Eighth Circuit has not reached the issue of whether the deadlines are jurisdictional. However, recently in *In re Moss*, 289 F.3d 540, 541 (8th Cir. 2002), the Eighth Circuit followed what is sometimes referred to as yet another view—namely, that an untimely objection may be excused, but only if it is the result of the court's own error.

Ninth Circuit —The Ninth Circuit itself has not ruled on the issue. However, the decision of its bankruptcy appellate panel in *Santos* provided the basis for the Fourth and Seventh Circuits to follow the non-jurisdictional line. Yet, even among the non-jurisdictional line of cases, the courts do not uniformly embrace *Santos*. For example, in *In re Dombroff*, 192 B.R. 615, 619 (S.D.N.Y. 1996) the court adopted the non-jurisdictional view, but at the same time rejected the reasoning in *Santos* as "misplaced." In addition, within the Ninth Circuit, there is authority directly contrary to *Santos*. *See In re American Sports Innovation*, 105 B.R. 614, 615 (Bankr. W.D. Wash. 1989) (the "deadline for filing dischargeability complaints is jurisdictional").

Tenth Circuit – As shown above, based on the Tenth Circuit's holding in *Barnes*, it adheres to the jurisdictional view.

Eleventh Circuit – The most recent decisions from the Eleventh Circuit continue to follow the jurisdictional view. *In re Tucker*, 263 B.R. 632, 636 (Bankr. M.D. Fla. 2001) (absent "extraordinary circumstances the deadlines are "jurisdictional and non-waivable"); *In re Dollar*, 257 B.R. 364, 367 (Bankr. S.D. Ga. 2001) (deadlines are jurisdictional); *In re Ginn*, 179 B.R. 349, 352 (Bankr. S.D. Ga. 1995) (deadlines in Rules 4004 and 4007 "raise a jurisdictional bar").

This survey underscores that the jurisdictional versus non-jurisdictional debate is ongoing, widespread and has created a state of confusion in the law.

Such a disarray in the law thwarts a uniform treatment of rules that are integral to bankruptcy's fresh-start policy. As a result, the rules for objecting to discharge now vary depending upon in which part of the country a person files bankruptcy.

In addition, there is yet another dimension to this conflict. This Court promulgates the Bankruptcy Rules under its own authority. *See* 28 U.S.C. § 2075. As such, this issue also calls upon this Court's supervisory role over federal rules.

Finally, the issue in this case is concrete and ripe for decision—if the respondent's claim was untimely, then the decision of the Seventh Circuit must be reversed. In sum, the reasons for this Court to accept review are compelling. The issue involves this Court's supervisory role over a rule that is central to bankruptcy law, and continues to divide courts across the country in a way that undermines the uniform administration of our bankruptcy system. This division of authority will not go away on its own, and there is only one place where it can be settled. This Court alone can resolve the conflict.

C. The Opinion Below Is Also Directly Contrary to this Court's Opinion in *Taylor v. Freeland & Kronz*—Indeed, Courts Following the Jurisdictional View Rely on *Taylor*

Not only is there a deep division among courts at all levels on this issue, the decision below is also directly contrary to this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). In *Taylor*, the Court considered the closely analogous Bankruptcy Rule 4003. This rule requires that objections to a debtor's claims of exempt property be filed within 30 days of the meeting of creditors. In *Taylor*, this Court held in an 8-to-1 decision that even though the debtor had no reasonable basis to claim an exemption, an objection made

after the Rule 4003 deadline was untimely and could not be considered under any type of equitable exception. *Id.* at 643-44. Justice Thomas, writing for the Court, stated: "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 644.[3]

Since *Taylor* was decided ten years ago, the lower courts have relied upon it repeatedly as mandating the jurisdictional view for objections to discharge. For example, most recently in *Leet*, the Sixth Circuit's bankruptcy appellate panel relied on *Taylor* to adopt the jurisdictional view. In particular, the panel found that "Rule 4003(b), the focus of attention in *Taylor* is similar to the rule at issue in this case, 4007(c), in that both rules provide a time limit within which papers must be filed." 274 B.R. at 697.

Again this year in *Rowland*, the court relied on this Court's affirmance of the Third Circuit in *Taylor* to support the jurisdictional view. 275 B.R. at 214-15. Similarly, in *In re Glover* the court relied on *Taylor* to adopt the jurisdictional view: "[Taylor] has made it clear that the deadlines set by the Bankruptcy Rule are jurisdictional in nature." 212 B.R. at 862. And once again, in *Thomas*, the court relied on *Taylor* to find that Rule 4007 was jurisdictional and stated, "the Court therefore holds that the *Taylor* 'plain meaning' construction applies to discharge and dischargeability actions." 203 B.R. at 68.

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[3] The Fifth and Sixth Circuits have held that the Rule 4003 deadline is jurisdictional. *In re Stoulig*, 45 F.3d 957, 957 (5th Cir. 1995) (affirming district court ruling that the bankruptcy court was "without jurisdiction to grant an extension of time to file objections" after the deadline expired); *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997) (Rule 4003 should be "viewed as jurisdictional").

The court below attempted to distinguish *Taylor* in a lengthy footnote. App. at 14-16, n.4. The court began its analysis by recognizing that the panel in *Leet* reached a different result. *Id.* After a detailed description of the holding in *Taylor*, the court's reason for distinguishing it was that *Taylor* did not state that a debtor had "an unlimited time in which to object" or that Rule 4003 was not "subject to usual equitable doctrines that apply to other deadlines and statutes of limitations." *Id.* However, whether other equitable defenses might apply to Rule 4003 was not at issue in *Taylor*. Further, at the end of its analysis and as an additional attempt to bolster its conclusion, the Seventh Circuit also noted that the doctrine of waiver serves to promote finality. *Id.* at 15. That statement is true enough as to waiver generally. However, it does not answer the question of whether the deadline is jurisdictional in the first place.

Thus, the Seventh Circuit's rationale cannot be squared with the reasoning in *Taylor*. The *Taylor* decision hinged on this Court's strict interpretation of the time limit set by Rule 4003. And based on that strict application of the rule, this Court did not recognize any "equitable exception" to the deadline—even in the face of an exemption claimed without a good faith basis. Therefore, if this Court rejected an equitable exception for "bad faith," there is no reason that it would, at the same time, still have kept the door open for other equitable exceptions such as waiver. If anything, the Seventh Circuit's opinion is far closer to Justice Stevens' dissenting opinion in *Taylor* that would allow equitable exceptions to the deadline. *Id.* at 646-49. In sum, the Seventh Circuit's decision cannot be reconciled with *Taylor*. As the panel in *Leet* found, *Taylor's* strict application of Rule 4003 applies equally to the similar deadlines in Rules 4004 and 4007, and thus mandates the jurisdictional view.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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In the
United States Court Of Appeals
for the Seventh Circuit

No. 01-2683

IN RE: ANDREW J. KONTRICK,

Debtor-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 5736—**Harry D. Leinenweber**, *Judge*.

ARGUED JANUARY 10, 2002—DECIDED JULY 8, 2002

Before HARLINGTON WOOD, JR., RIPPLE and ROVNER, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Dr. Andrew Kontrick filed a Chapter 7 bankruptcy petition on April 4, 1997. Dr. Robert Ryan, a judgment creditor, then filed an adversary proceeding objecting to Dr. Kontrick's discharge. Ruling on summary judgment, the bankruptcy court denied Dr. Kontrick discharge under 11 U.S.C. § 727(a)(2)(A). The district court affirmed the bankruptcy court's decision. Dr. Kontrick now appeals and raises three objections to the bankruptcy court's decision. First, he argues that Dr. Ryan's complaint was untimely. Second, he argues that the bankruptcy court incorrectly concluded that he had waived his objection to the timeliness of Dr. Ryan's complaint and, further, that he could not have waived such an objection be-

cause Federal Rule of Bankruptcy Procedure 4004(a)'s time limit is jurisdictional and not subject to waiver. Finally, Dr. Kontrick contends that the bankruptcy court improperly granted summary judgment because there is a genuine issue of material fact about his intent in transferring his paychecks to his wife in the year before bankruptcy. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

A. Facts

Dr. Ryan and Dr. Kontrick, both cosmetic and plastic surgeons, were business associates. Each was a 50% shareholder in a professional corporation that Dr. Ryan had established. Dr. Kontrick had begun as an employee of the corporation and then, in 1989, he became part-owner. The association of the two physicians in this arrangement was a short and unhappy one. A variety of disputes, the details of which are not material to this appeal, arose. These disagreements were heard in two separate arbitrations. In the first, commenced in January 1992, Dr. Ryan was awarded $47,157.81 plus interest, expenses and attorneys' fees. Dr. Kontrick paid a total of $65,261.32 in satisfaction of this first arbitration. The second arbitration, commenced in October 1992, resulted in a 1995 award to Dr. Ryan of $519,324.42, including punitive damages, costs, expenses and attorneys' fees. The Circuit Court of Cook County entered a judgment on the award; the Illinois Appellate Court later reversed the punitive damages award and reduced the prejudgment interest rate. *See Ryan v. Kontrick*, 710 N.E.2d 11 (Ill. App. Ct. 1999).

During the first arbitration, Dr. Ryan filed a citation to discover Dr. Kontrick's assets. In an ensuing deposition, Dr. Kontrick was asked about his family finances, including his decision to remove his name from

the family checking account. Dr. Kontrick testified that personal expenses were paid from that account, now only in his wife's name, and admitted that "[i]t used to be my personal account. I don't have that account anymore." R.16-1, Ex. 7 at 7-8; *see id.* at 10-11, 17-19. He continued: "What prompted this change was the ridiculous maneuvers that you and your client [Dr. Ryan] have put me through in order to collect money which you don't have coming to you." *Id.* at 9. Dr. Kontrick further elaborated, stating that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So I felt this was a way of protecting myself." *Id.* at 12. In Dr. Kontrick's view, this arrangement would protect him from people who were "more than willing to take your money on some pretense or some technicality that they push through some court and all kinds of wranglings. As you know, this is exactly what went on." *Id.* To protect himself from individuals, whom he identified as former patients who have suffered "some perceived wrong," Dr. Kontrick divested himself of his personal wealth, transferring much of it to his wife and daughter. *See id.* at 13-14. As part of this effort to insulate his assets from potential judgment creditors, Dr. Kontrick removed his name from the family checking account, leaving his wife as the sole signatory; he continued to deposit his paychecks into that account. *See id.* at 17-19. Summing up his approach to his finances, Dr. Kontrick testified that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything." *Id.* at 29-30.

B. Bankruptcy Court Proceedings

Dr. Kontrick filed for bankruptcy in April 1997. On January 13, 1998, Dr. Ryan, after having been

granted three extensions of time, filed his adversary complaint objecting to Dr. Kontrick's discharge. This adversary complaint included four counts (I-IV) objecting to discharge under 11 U.S.C. §§ 727(a)(2)-(5) and three counts (V-VII) seeking a determination of the nondischargeability of Dr. Kontrick's debts to Dr. Ryan under 11 U.S.C. §§ 523(a)(2), (4) & (6). Dr. Ryan filed an amended complaint on May 6, 1998, without a court-approved extension, which included for the first time the specific allegation that Dr. Kontrick had violated § 727(a)(2)(A) by taking his name off of a family checking account ("family account") and continuing to deposit his paychecks into the account.[1] Dr. Kontrick answered the amended complaint on June 10, 1998; in his answer, Dr. Kontrick admitted the transfers to the family account but denied violating § 727(a)(2)(A).

In March 1999, Dr. Ryan moved for summary judgment on all counts. Appended to his motion was a statement of facts pursuant to Local Bankruptcy Rule 402 ("402 M statement"). In August 1999, Dr. Kontrick filed a motion to strike portions of Dr. Ryan's 402 M statement. Dr. Kontrick maintained that "Ryan's 402 M statement contains an array of material that is not tied to anything alleged in the complaint." R.10-1, Ex. 12 at 2. In this motion, Dr. Kontrick quoted Dr. Ryan's amended complaint for the purpose of comparing the allegations in the amended complaint with the facts claimed in the 402 M statement. Dr. Kontrick also filed a cross-motion for summary judgment.

The bankruptcy court granted Dr. Ryan's motion for summary judgment on Count I. The court also granted in part and denied in part Dr. Kontrick's motion to strike. The court found that, because

[1] The original complaint included an objection to discharge based on § 727(a)(2)(A), but did not include a factual allegation with respect to the family account.

Dr. Kontrick continued to place his paycheck into the family account, there was a transfer within one year of bankruptcy, as required by § 727(a)(2)(A). Further, the court reasoned that, although "[g]enerally, the question of intent will prevent the granting of summary judgment . . . here, the Debtor's intent is clear." Bankr. Op. at 14. "Kontrick, during the deposition pursuant to the citation to discover assets, freely admitted he transferred the bank account to Carolyn [his wife] to prevent his creditors from attaching the funds." *Id.* at 14-15. Therefore, the court concluded, Dr. Kontrick had made transfers within one year of bankruptcy with the "intent to hinder, delay, or defraud his creditors" within the meaning of § 727(a)(2)(A). The court denied discharge and then dismissed the remaining counts in Dr. Ryan's complaint.

Dr. Kontrick filed a motion to reconsider the bankruptcy court's decision. He argued that he had objected to the timeliness of Dr. Ryan's amended complaint and that the family account claim was improperly considered because it was untimely under Bankruptcy Rule 4004(a). In denying the motion to reconsider, the bankruptcy court held that Dr. Kontrick had waived an objection to the timeliness of the family account claim.

C. District Court Proceedings

Dr. Kontrick appealed the bankruptcy court's decision to the United States District Court for the Northern District of Illinois. Dr. Kontrick submitted that the bankruptcy court had erred in finding that he had waived his Rule 4004(a) objection and that, even if he had failed to raise the objection, it could not be waived because Rule 4004(a) is jurisdictional and thus not subject to equitable doctrines such as waiver. Dr. Kontrick also contended that the bankruptcy court erred in granting summary judgment because there

was a genuine issue of material fact about his intent in transferring his paycheck to his wife's account in the year before bankruptcy.

The district court rejected all of Dr. Kontrick's arguments. First, the court concluded that Rule 4004(a) was not jurisdictional; it was more like a statute of limitations and could be waived. Second, the court determined, that, although Dr. Kontrick had mentioned that the amendment was late in his motion to strike, he did not raise the issue in his responsive pleading and thus had waived it. Finally, the court agreed with the bankruptcy court that Dr. Kontrick's deposition testimony from 1993 was conclusive on the issue of intent and affirmed the bankruptcy court's grant of summary judgment.

II

A.

We turn first to the timeliness of Dr. Ryan's objection to the discharge in bankruptcy. There is no dispute that Dr. Ryan's amended complaint, which included the family account allegation, was filed beyond the 60-day limit for filing objections and that there was no court-approved extension of time permitting him to file when he did.[2] The bankruptcy court and the district court concluded that Dr. Kontrick had waived any objections to the timeliness of Dr. Ryan's

[2] Neither the bankruptcy court nor the district court discussed whether the family account allegation properly related back to the timely complaint of January 13, 1998, such that the family account claim itself was timely. *See In re Magno*, 216 B.R. 34, 37-40 (BAP 9th Cir. 1997). Both courts assumed that the amended complaint and the family account allegation of May 6,1998, were untimely. Dr. Ryan does not contest this assumption on appeal. Therefore, we shall proceed in the same fashion as the bankruptcy and district courts and assume that the amended complaint was untimely.

complaint. To determine whether the 60-day time limit precludes consideration of Dr. Ryan's objection to discharge, we must engage in a two-part inquiry. First, we must decide whether the 60-day time limit for filing objections to discharge under § 727(a), *see* Fed. R. Bankr. P. 4004(a), is a jurisdictional prerequisite that cannot be waived, or whether it is akin to a statute of limitations and thus subject to waiver. If Rule 4004(a) is a jurisdictional requirement, then Dr. Kontrick cannot have waived his objection. Second, if we determine that the time limit is not jurisdictional, we must decide whether the bankruptcy court correctly determined that Dr. Kontrick did indeed waive objection.

1.

We first focus on whether the time limit for filing objections to discharge contained in Federal Rule of Bankruptcy Procedure 4004(a) is a jurisdictional prerequisite and, therefore, cannot be waived. "Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985). Our task is to determine whether Rule 4004(a) is an exception to this principle. This question has divided the bankruptcy courts that have had occasion to confront it. *Compare In re Santos*, 112 B.R. 1001, 1008 (BAP 9th Cir. 1990) (holding that Rules 4004(a) and 4007(c) are subject to waiver); *In re Steiner*, 209 B.R. 281, 286 (Bankr. E.D.N.Y. 1996) (same); *In re Walker et al.*, 195 B.R. 187, 206-07 (Bankr. N.H. 1996) (same); *In re Begue*, 176 B.R. 801, 804 (Bankr. N.D. Ohio 1995) (same), *with In re Glover*, 212 B.R. 860, 861 (Bankr. S.D. Ohio 1997) (holding that time limits are jurisdictional and not subject to waiver); *In re Ham*, 174 B.R. 104, 106-07 (Bankr. S.D. Ill. 1994) (same); *In re Kirsch*, 65 B.R. 297, 299-303 (Bankr. N.D. Ill. 1986) (same). United States Courts of Appeals opinions, however, have produced unanimity. *See In re Benedict*,

90 F.3d 50, 54-55 (2d Cir. 1996) (holding that time limits are not jurisdictional and thus are subject to equitable defenses); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 248 (4th Cir. 1994) (same).

We begin with the text of the provision in issue. Rule 4004(a) provides: "In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors." Fed. R. Bankr. P. 4004(a). The analogous provision to Rule 4004(a) for objections to the dischargeability of a particular debt is Rule 4007(c) which provides: "A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr. P. 4007(c). Both of these rules contain provisions for the extension of the time limit. Rule 4004(b) permits the bankruptcy court to extend the time limit for cause, if the motion is filed before time expires. *See* Fed. R. Bankr. P. 4004(b). Rule 4007(c) has a similar provision for extending its time limit. *See* Fed. R. Bankr. P. 4007(c).[3]

As the opinions of the courts that have confronted this issue demonstrate, the texts of these bankruptcy rules yield no definitive answer to the question of whether the time limitations contained in these rules are jurisdictional in nature. The rules we have just described do not, as a matter of textual interpretation, address the issue. Although Rule 9006(3) restricts the grounds upon which the bankruptcy court may enlarge the time for actions required by Rules 4004(a) and

[3] Because the rules are almost identical, it is appropriate to consider decisions by courts construing Rule 4007(c) as well as Rule 4004(a). *See In re Santos*, 112 B.R. 1001, 1004 n.2 (BAP 9th Cir. 1990).

4007(c), these restrictions still vest a great deal of discretion in the bankruptcy court.

In the absence of a clear textual resolution of the issue, we must look elsewhere. In our view, the decision of the United States Bankruptcy Appeals Panel of the Ninth Circuit in *In re Santos*, 112 B.R. 1001, 1005 (BAP 9th Cir. 1990), presents a sound framework for analyzing whether the time limitations of Rules 4004(a) and 4007(c) are jurisdictional. As that court noted, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-97 (1982), teaches that, in order to determine whether the filing requirements are jurisdictional, we must examine "the structure, legislative history and underlying policy of the provision in question and the related statutory scheme." *In re Santos*, 112 B.R. at 1005.

a.

We turn first to an examination of the role that these rules play within the overall structure of the bankruptcy rules in the hope that such an inquiry might yield a more definitive understanding of whether the rules in question ought to be governed by the general principle that a filing deadline is subject to equitable defenses or whether they are jurisdictional in nature.

In a thoughtful effort to apply this methodology, one bankruptcy decision, *In re Kirsch*, 65 B.R. 297, 301-02 (Bankr. N.D. Ill. 1986), reasoned that the situation presented by these bankruptcy rules is analogous to the one presented to this court in *Hulson v. Atchison, Topeka & Santa Fe Railway Co.*, 289 F.2d 726 (7th Cir. 1961). In *Hulson*, this court, applying the Federal Rules of Civil Procedure, held that the deadline for filing a motion for a new trial or a judgment notwithstanding the verdict under Rule 50(b) was jurisdictional and could not be extended pursuant to Rule 6(b). *See Hulson*, 289 F.2d at 729. The bankruptcy court in *Kirsch* analogized Rule

6(b) to Bankruptcy Rule 9006(b). *See In re Kirsch*, 65 B.R. at 301-02. It first noted that Rule 9006(b) was modeled on Rule 6 and serves a similar purpose in describing the proper functioning of time limits elsewhere in the rules and in limiting the power of courts to enlarge the time limits contained in certain rules. The court then noted that Rule 6(b), although generally permitting the district court to enlarge the time in which an act must be done under the rules, specifically excludes from this general approach, actions "under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and wider 60(b), except to the extent and under the conditions stated in them." *See In re Kirsch*, 65 B.R. at 301 (quoting Fed. R. Civ. P. 6(b)). In *Hulson*, this court had said that the time limitations contained in Rules 50(b), and 59(b), (d) and (e) prohibit the district court from acting on a motion not filed within the time specified in the rule. *See Hulson*, 289 F.2d at 729. Because Bankruptcy Rule 9006(b) contains the same limit with respect to Rule 4004(a), reasoned the court in *Kirsch*, the limitations in Rule 4004(a) also are not subject to judicial abrogation. *See In re Kirsch*, 65 B.R. at 302.

In light of the policy concerns that animate the bankruptcy rules at issue, we do not think that the analogy to the civil rules relied upon by the court in *Kirsch* is very helpful in resolving the problem before us. Rule 50(b) and the other civil rules referenced in Rule 6(b) govern actions after a final judgment has been entered. Unless the time limits are strictly construed, a prevailing party will be left uncertain as to the status of his judgment. Substantial prejudice to a prevailing party could occur if the defeated party had an indefinite time period to seek a new trial. By contrast, Rules 4004(a) and 4007(c) apply before any adjudication has taken place and govern the timeliness of a complaint, which in turn invites a responsive pleading, an answer. A debtor can defeat an untimely complaint by raising

Rule 4004(a) or Rule 4007(c) as an affirmative defense in his answer. Although there is an important interest in limiting the time in which the dischargeability of debts can be challenged in order to ensure that debtors are not "harassed by creditors after their claims have been discharged in bankruptcy," *Kirsch*, 65 B.R. at 300, we do not think that it is at all evident that Congress intended to limit the authority of the bankruptcy court so rigidly as to preclude all relief from the time constraints of the rule. Notably, Rules 4004(b) and 4007(c) explicitly permit the bankruptcy court to enlarge the time for filing a complaint objecting to discharge. As the court pointed out in *In re Santos*, 112 B.R. at 1006, if Rule 4004(a) is jurisdictional, then even a final judgment would be subject to collateral attack, a result that would hardly serve the Bankruptcy Code's goal of promoting certainty and finality for debtors. Were we to hold that these rules were jurisdictional, bankruptcy judgments would be subject to collateral attack after the bankruptcy court has completed its work and after the parties have complied with the court's mandate. *See In re Santos*, 112 B.R. at 1006. This situation would be "clearly at odds with the purpose of promoting finality and certainty of relief." *Id.*

Even when the underlying policy concerns of the Bankruptcy Code are reviewed without reference to the analogy to the civil rules suggested in *Kirsch*, characterization of these bankruptcy rules as jurisdictional would yield too rigid a result to achieve the goals of the bankruptcy statute. As the bankruptcy panel pointed out in *Santos*, there are, to be sure, some goals of bankruptcy relief that are promoted by expeditious and definitive resolution of the question of dischargeability. Indeed, among the goals of the rules in question is furtherance of the prompt administration of bankruptcy estates and protection of the "fresh start" objective of the Code by allowing the debtor to enjoy finality and

certainty of relief. *See In re Santos*, 112 B.R. at 1006. However, as the panel in *Santos* also pointedly noted, these goals are best fostered, not by a rigid jurisdictional approach, but by the exercise of equitable discretion in a manner consistent with the policies that animate the Bankruptcy Code. *See id.* Indeed, as another Ninth Circuit bankruptcy panel intimated, requiring that an enlargement of time be sought during the period in which the complaint should have been filed, but nevertheless giving at least that limited opportunity evidences that Congress, although desirous of finality, realized that a rigid rule also could be inequitable at times and frustrate the goals of the Code. *See In Re Rhodes*, 61 B.R. 626, 629-30 (BAP 9th Cir. 1986).

b.

As the bankruptcy panel in *Santos* also noted, the overall statutory structure of the bankruptcy statute also provides support for the view that the rules are not jurisdictional. *See In re Santos*, 112 B.R. at 1005. The statutes granting jurisdiction to the bankruptcy and district courts over bankruptcy matters do not indicate that timeliness of objections to discharge is a jurisdictional predicate. *See* 28 U.S.C. §§ 157(b)(1), 1334. An "objection[ ] to discharge" is a "core proceeding[ ]" over which the bankruptcy court exercises jurisdiction. 28 U.S.C. § 157(b)(2)(J). Nowhere in the definition of core proceedings is the adjective "timely" used to define a core proceeding. Thus, there is nothing within § 157(b) to indicate that a bankruptcy court is precluded from considering untimely objections to discharge.

Matters of timeliness are, notably, present in other provisions. For instance, section 157(b)(3) states that "[t]he bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding." 28 U.S.C. § 157(b)(3). Further, for a party to obtain de novo re-

view in the district court of a bankruptcy court's findings of fact and conclusions of law in a non-core proceeding, that party must "timely and specifically object[ ]." 28 U.S.C. § 157(c)(1). These references to timeliness in sections other than the grants of jurisdiction support the view that timeliness is not a prerequisite to the bankruptcy court's exercise of jurisdiction in a core proceeding such as Dr. Ryan's objection to discharge.

c.

We find the legislative history of the rules in question to be of marginal assistance in our task. The notes of the Advisory Committee with respect to Rule 4007 state in part:

> Subdivision (c) differs from subdivision (b) by imposing a deadline for filing complaints to determine the issue of dischargeability of debts set out in § 523(a)(2), (4) or (6) of the Code. The bankruptcy court has exclusive jurisdiction to determine dischargeability of these debts. If a complaint is not timely filed, the debt is discharged. *See* § 523(c).

One plausible reading of this passage is, as the court in *Santos* acknowledged, that the bankruptcy court can only act on a dischargeability complaint if it is filed in a timely manner. *See Santos*, 112 B.R. at 1005. However, the notes to the 1999 amendments explicitly reiterate the right of a party to seek an enlargement of time, thus acknowledging that some flexibility was intended by the drafters. In any event, we agree with the panel in *Santos* that this passage in the Committee note is hardly conclusive or even persuasive in light of the structure and policy of the Code and the bankruptcy rules.

d.

Accordingly, we join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions at issue here are not jurisdictional. *See In re Benedict*, 90 F.3d 50, 53-54 (2d Cir. 1996); *Farouki v. Emirates Bank Int'l Ltd.*, 14 F.3d 244, 248 (4th Cir. 1994). These rule provisions are subject to equitable defenses, although those defenses must be applied in a manner consistent with the manifest goals of Congress to resolve the matter of dischargeability promptly and definitively in order to ensure that the debtor receives a fresh start unobstructed by lingering doubts about the finality of the bankruptcy decree.[4]

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[4] Contrary to Dr. Kontrick's assertion, we do not think that the Supreme Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), requires a different result. *But see In re Leet*, 274 B.R. 695, 696-97 (BAP 6th Cir. 2002). In *Taylor*, the Court held that there was no good-faith exception to the time limits for filing objections to a debtor's list of exempt property. *See Taylor*, 503 U.S. at 644-45. Under 11 U.S.C. § 522(b), a debtor may claim certain property as exempt from his bankruptcy estate; the debtor may elect to use exemptions under state or federal law. *See* 11 U.S.C. § 522(b)(1)-(2). Section 522(1) describes the procedures for claiming such exemptions: "The debtor shall file a list of property the debtor claims as exempt. . . . Unless a party in interest objects, the property claimed on such list is exempt." *Id.* § 522(1). Bankruptcy Rule 4003(b) provides that "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors." Fed. R. Bankr. P. 4003(b).

In *Taylor*, the debtor had claimed as exempt the proceeds from an employment discrimination lawsuit that was pending in state court at the time of her bankruptcy filing. *See Taylor*, 503 U.S. at 640. The parties agreed that there was no basis for her to claim an exemption for the full amount of the proceeds. *See id.* at 642. Nevertheless, the trustee declined to object to the exemption because he believed that the lawsuit was meritless. *See id.* at 641. He was incorrect, and the debtor eventually settled for about $110,000, a portion of which the debtor paid to her attorneys in the discrimination suit. *See id.* Upon learning of the settlement, the trustee returned to the bankruptcy court almost two years after the bankruptcy proceedings ended and demanded that the debtor and her attorneys turn over the funds on the ground that they were the property of the bankruptcy estate. *See id.* The trustee argued that the time limits in Rule 4003(b) only applied to exemptions filed in good faith and because the debtor had no good-faith basis for claiming the exemption, the trustee was able to file his objection outside of the time limit. *See id.*

The Supreme Court rejected this argument. *See Taylor*, 503 U.S. at 642. The Court held that the deadline in Rule 4003(b) should be construed strictly: "By negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.'" *Id.* at 643. Since no objection was filed within 30 days, the property was exempt by the operation of 11 U.S.C. § 522(1). *See id.* The Court noted that "despite what respondents repeatedly told him, [the trustee] did not object to the claimed exemption. If [the trustee] did not know the value of the potential proceeds of the lawsuit, he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object." *Id.* at 644. Thus, the Court concluded that objections filed outside the time limit were untimely and should not have been considered by the bankruptcy court. *Id.* The Court further concluded that there was no statutory basis for reading a good-faith exception into § 522(1). *See id.* at 644-45. The Court did not hold, however, that the debtor had an unlimited time in which to object to the trustee's untimely objection or that Rule 4003(b) was not subject to the usual equitable doctrines that apply to other deadlines and statutes of limitations.

While the Court in *Taylor* did stress the importance of deadlines, *see Taylor*, 503 U.S. at 644, we believe this emphasis supports our conclusion, rather than undermines it. As the Court noted, "[d]eadlines may lead to unwelcome results, but they prompt parties to act and promote finality." *Id.* This analysis applies with equal force to the doctrine of waiver, which requires parties to put all of their arguments before the appropriate court at the appropriate time for a full resolution of their claims. Here, parties are prompted to action and finality is served by our conclusion that parties may waive any objection to the untimeliness of a creditor's complaint if the objection is

Having determined that an objection to the timeliness of a complaint under Rule 4004(a) is subject to waiver, we must now decide whether Dr. Kontrick did waive his objection. In making that determination, we must keep in mind the Congressional policy of resolving the matter of dischargeability promptly and of permitting the debtor to begin his fresh start without lingering doubts about the finality of the bankruptcy court's actions.

As a general matter, a statute of limitations defense must be raised in an answer or responsive pleading. *See* Fed. R. Civ. P. 8(c); *see also Jackson v. Rockford Housing Auth.*, 213 F.3d 389, 392-93 (7th Cir. 2000). Federal Rule of Civil Procedure 8 is incorporated into the Bankruptcy Rules. *See* Fed. R. Bankr. P. 7008. Dr. Kontrick filed his voluntary petition for relief under Chapter 7 on April 4, 1997. On January 13, 1998, Dr. Ryan filed his original adversary complaint. Later, on May 6, 1998, Dr. Ryan filed an amended complaint. Dr. Kontrick answered the amended complaint on June 10, 1998, without raising his Rule 4004(a) untimeliness defense.

Dr. Kontrick argues that he raised the issue in his motion to strike portions of Dr. Ryan's motion for summary judgment. Dr. Kontrick's motion to strike was filed on August 2, 1999. Even assuming, arguendo, that Dr. Kontrick's motion to strike was an acceptable vehicle for raising a Rule 4004(a) objection, we must conclude that Dr. Kontrick waived his objection to the timeliness of Dr. Ryan's complaint.

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Sumner*, 265 F.3d 532, 537 (7th Cir. 2001). A waiver may be explicit or implicit. A party may waive an argument if

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not raised at the proper time.

it is not raised at the proper time. *See Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999). Generally, statute of limitations defenses must be raised in an answer or responsive pleading. *See* Fed. R. Civ. P. 8(c). With these principles in mind, we turn to an examination of Dr. Kontrick's motion to strike portions of the motion for summary judgment. In that motion, Dr. Kontrick submitted that "Ryan's Rule 402 M statement contains an array of material that is not tied to anything alleged in his complaint." R.10-1, Ex. 12 at 2. To support this argument, Dr. Kontrick then listed the allegations made in Dr. Ryan's amended complaint in order to compare them with factual statements in Dr. Ryan's 402 M statement. In short, he used the allegations of the amended complaint as a "baseline" to establish that the Rule 402 M statement went beyond the bounds of that complaint. Included within the excerpts from Dr. Ryan's amended complaint are his factual allegations under Count I, the objection to discharge under § 727(a)(2)(A). From paragraph 56 of Dr. Ryan's amended complaint, Dr. Kontrick recites: "Removing name from family bank account." *Id.* at 4. At the conclusion of this summary of Dr. Ryan's allegations, Dr. Kontrick states: "This is the extent of the allegations in the complaint. Ryan has not even attempted to amend his complaint to add additional allegations." *Id.* at 5.

What is clear from Dr. Kontrick's motion to strike is that he is relying on Dr. Ryan's amended complaint, including the family account claim, to object to additional allegations made in Dr. Ryan's 402 M statement. Nowhere does Dr. Kontrick contest the timeliness of the allegations in the amended complaint. This failure is sufficient to constitute waiver of Dr. Kontrick's objection to the timeliness of the complaint. Indeed, Dr. Kontrick did not raise the timeliness

issue until after the bankruptcy court entered summary judgment for Dr. Ryan.

Under these circumstances, we must conclude that Dr. Kontrick waived the argument that Dr. Ryan's allegation that discharge ought to be denied because of Dr. Kontrick's handling of his checking account was untimely. This conclusion is compatible with the general principles that govern the application of the waiver defense and is also compatible with the policies underlying the Bankruptcy Code. Here, the timeliness issue was not presented to the bankruptcy court until after it had ruled on the question of whether a discharge ought to be refused. The policy concerns of expeditious administration of bankruptcy matters and the finality of the bankruptcy court's decision hardly are fostered by requiring the bankruptcy court to consider the timeliness of an issue that it already has adjudicated.

B.

We must now determine whether the bankruptcy court properly granted summary judgment to Dr. Ryan and denied Dr. Kontrick his discharge. We review a grant of summary judgment de novo. *See In re Lefkas Gen'l Partners*, 112 F.3d 896, 899-900 (7th Cir. 1997). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party resisting summary judgment cannot succeed simply by resting on his pleadings, he must come forth with positive evidence in support of his position. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). There is no "genuine" issue of material fact "for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "When the moving party has carried its burden under Rule 56(c), its opponents must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In making this determination, all reasonable inferences must be drawn in favor of the nonmovant.

The bankruptcy court granted summary judgment on Count I of Dr. Ryan's complaint, which alleged that discharge should be denied because Dr. Kontrick had violated 11 U.S.C. § 727(a)(2)(A). Section 727(a)(2)(A) provides, in relevant part, that "[t]he court shall grant the debtor a discharge unless . . . the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2)(A). To prevail, Dr. Ryan must prove that (1) the debtor, Dr. Kontrick, (2) transferred (3) the debtor's property, (4) with the intent to hinder, delay, or defraud a creditor (5) within one year of bankruptcy. *See id.* The exception to discharge in § 727(a)(2)(A) essentially "consists of two components: an act (i.e., a transfer or a concealment of property) and an improper intent (i.e., a subjective intent to hinder, delay, or defraud a creditor)." *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d. Cir. 1993). "The party seeking to bar discharge must prove that *both* these components were present during the one year before bankruptcy; anything occurring before that one year period is forgiven." *Id.* (emphasis in original). In bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor." *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985). Even with these principles in mind, we believe that Dr. Ryan has satisfied the statute's prerequisites sufficiently to support the bankruptcy court's grant of summary judgment.

Dr. Kontrick does not dispute that he continued to deposit his paycheck into the family account in the year before bankruptcy. Instead, he argues that there is a question of fact about his intent and that there was no act to hinder, delay or defraud creditors within one year. *See* Appellee's Br. at 13. Dr. Kontrick cites *In re Ratner*, 132 B.R. 728, 733 (N.D. Ill. 1991), for the proposition that a debtor has no obligation to maintain a checking account for the benefit of his creditors. This proposition is true as far as it goes, but § 727(a)(2)(A) makes it clear that a debtor may not divest himself of property with the intent to hinder, delay or defraud his creditors and still receive a discharge. In *Ratner*, the court determined that the bankruptcy court had not committed error in concluding that the circumstances surrounding the use of a spouse's checking account did not supply sufficient circumstantial evidence to permit the conclusion that the debtor had attempted to evade payment to his creditors. Here, however, we have direct evidence of Dr. Kontrick's intent.

In his 1993 deposition pursuant to Dr. Ryan's citation to discover assets, Dr. Kontrick admitted that he took his name off the checking account, stating that "[i]t used to be my personal account. I don't have that account anymore." R.16-1, Ex. 7 at 7-8. Moreover, he said that he took this action because of "the ridiculous maneuvers that you and your client [Dr. Ryan] have put me through in order to collect money which you don't have coming to you." *Id.* at 9. Dr. Kontrick wanted to protect himself from the "thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have." *Id.* at 12. Dr. Kontrick freely admitted that his divestitures were designed to diminish the amount of money creditors would be able to obtain from a judgment against him, including Dr. Ryan with whom Dr. Kontrick was engaged in a nasty business

dispute at the time. "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything." *Id.* at 29-30.

Intent is normally a question of fact and often not susceptible to summary judgment. Here, however, we have direct and unrebutted evidence, from Dr. Kontrick's own words, of his intent. Dr. Kontrick cannot defeat summary judgment simply by raising a "metaphysical doubt" about his intent. *See Matsushita*, 475 U.S. at 586. Dr. Kontrick has not put forth any evidence suggesting that his intent with respect to the family account changed between his 1993 deposition and his depositing his paycheck into the family account in the year before he filed for bankruptcy. There is also nothing in his circumstances to suggest that his intent was any different in 1997 than it had been in 1993. Dr. Kontrick's bitter dispute with Dr. Ryan was ongoing, with Dr. Kontrick owing to Dr. Ryan a judgment at one point valued at more than $600,000. The record contains no basis for the conclusion that, although Dr. Kontrick removed his name from the family account in late 1992 or early 1993 to thwart his creditors, his deposits in 1996 and 1997 were for a purpose permitted by the Code.

The bankruptcy court was entitled to conclude that those deposits were "transfers" of Dr. Kontrick's property, with the "intent to hinder, delay, or defraud a creditor" within one year of filing for bankruptcy. 11 U.S.C. § 727(a)(2)(A). By depositing his paycheck into an account over which he had no control, Dr. Kontrick put those assets beyond the reach of his creditors, just as he had done with the property that he transferred to his wife and daughter before 1993.

In support of his contention that summary judgment was inappropriate here, Dr. Kontrick invites

our attention to *Rosen v. Bezner*, 996 F.2d 1527 (3d Cir. 1993). In *Rosen*, the debtor transferred his interest in his principal residence to his wife on December 28, 1987 for no consideration. *See Rosen*, 996 F.2d at 1529. Almost two years later, on September 12, 1989, the debtor filed a chapter 7 bankruptcy petition. *See id.* at 1530. The trustee objected, arguing that the debtor had transferred his property with the actual intent to hinder, delay or defraud a creditor. *See id.* The bankruptcy court granted summary judgment to the trustee and the district court affirmed. *See id.* The Third Circuit reversed, and remanded the case to the bankruptcy court for a factual determination of the debtor's intent. *See id.* at 1533. Unlike this case, *Rosen* involved the application of the "continuing concealment" doctrine under which "a concealment will be found to exist during the year before bankruptcy even if the initial act of concealment took place before this one year period as long as the debtor allowed the property to remain concealed into the critical year." *Id.* at 1531. That doctrine is inapplicable when, as here, the transfers took place within one year of bankruptcy. Finally, unlike the court in *Rosen*, we have unrefuted evidence of Dr. Kontrick's intent in first arranging his finances as he did and no evidence to suggest that his intent has changed.

There is no genuine issue of material fact regarding the applicability section 727(a)(2)(A)'s exception to discharge. Dr. Kontrick violated section 727(a)(2)(A) by depositing his paycheck into the family account, over which he had no control. Dr. Ryan is entitled to judgment as a matter of law on Count I of his amended complaint.

Conclusion

Dr. Kontrick waived his objection to the timeliness of Dr. Ryan's amended complaint. The bankruptcy court properly granted summary judgment to Dr. Ryan and denied Dr. Kontrick's discharge under 11 U.S.C. § 727(a)(2)(A). The judgment of the district court sustaining that decision is therefore affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Dated August 27, 2002

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01 - 2683

IN RE:
ANDREW J. KONTRICK,

Debtor-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 00 C 5736

Harry D. Leinenweber,
Judge.

ORDER

Upon consideration of the Appellant's petition for rehearing *en banc*, filed on July 22, 2002, no judge in active service* has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

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* The Honorable Joel M. Flaum and The Honorable Ann Claire Williams did not participate in the consideration of the suggestion for rehearing en banc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT A. RYAN,	Case No. 00 CV 5736
Plaintiff/Appellee,	Judge Harry D. Leinenweber
v.	(Appeal from adversary proceeding No. 98 113,
ANDREW J. KONTRICK,	Hon. John D. Schwartz, Bankruptcy Case No. 97 B
Defendant/Appellant.	10353)

MEMORANDUM OPINION AND ORDER

Andrew Kontrick ("Kontrick") filed for bankruptcy on April 4, 1997, and Robert Ryan ("Ryan") filed a seven-count complaint objecting to discharge on January 13, 1998. Ryan moved for summary judgment on Counts I-IV, and the bankruptcy court granted the motion on the "family account" claim in Count I and denied the motion as to Counts II-IV. Kontrick appealed the bankruptcy court's decision to this court.

INTRODUCTION

The following facts are taken from the bankruptcy court's Amended Memorandum Opinion.

Kontrick and Ryan are both physicians. In 1983 Kontrick joined Ryan's medical practice, and in 1989 he became a stockholder. Various disputes arose between them, and in July 1992 an arbitrator issued an award in favor of Ryan in the amount of $47,157.00. In October 1992, the parties were engaged in a second arbitration. In April 1993, Ryan attempted to settle all disputes between them for about $96,501.00, which Kontrick re-

jected. In June 1993, Ryan sought to collect the award from the first arbitration and served Kontrick with a citation to discover assets. In July 1993, however, Kontrick paid Ryan the full award in the first arbitration plus some additional fees and costs. In May 1995, the arbitrator entered an award for $519, 324.00 in the second arbitration, which included punitive damages. The Illinois Appellate Court later reversed and vacated the award of punitive damages and the rate of prejudgment interest while affirming the remainder of the award. *See Ryan v. Kontrick*, 304 Ill. App. 3d 852, 710 N.E. 2d 11 (1st Dist. 1999). Kontrick made a settlement offer to Ryan of $193,000.00, which Ryan rejected and he proceeded to file another citation to discover assets.

On April 4, 1997, Kontrick filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code (the "Code"). On January 13, 1998, Ryan filed his original adversary complaint with the court consisting of four counts seeking to deny Kontrick his discharge pursuant to §§ 727(a)(2), (3), (4) and (5), and three counts seeking a finding that Kontrick's debt to Ryan was nondischargeable pursuant to §§ 523 (a) (2), (4), and (6). On May 6, 1998, Ryan filed an amended complaint seeking the same relief and differing only in certain factual allegations. Kontrick answered the complaint on June 10, 1998. Ryan moved for summary judgment on Counts II-IV seeking to bar Kontrick from receiving his discharge pursuant to §§ 727(a)(2), (3), (4) and (5). Kontrick, in turn, moved to strike portions of Ryan's 402 (M) statement and certain of the attached exhibits. The bankruptcy court entered its original Memorandum Opinion on February 25, 2000, and then later amended the opinion to correct a factual error. The bankruptcy court granted Ryan's motion as to Count I denying Kontrick his discharge and denied summary judgment on Counts II-IV. Further, Kontrick filed a motion to reconsider, which was

denied on June 8, 2000. The bankruptcy court entered final judgment on June 13, 2000, and Kontrick filed an appeal.

In Count I Ryan argued, among many other things, that Kontrick should be denied discharge pursuant to § 727(a)(2) because he took his name off of the family bank account yet he continued to deposit his employment checks into that account (the "family account" claim). Kontrick and his wife, Carolyn Kontrick, used to have a joint checking account where Kontrick deposited his salary checks into the account, and Carolyn paid the family expenses out of the account. In 1992 or 1993, Kontrick removed his name from the checking account, but he continued to deposit his salary checks into the account and Carolyn continued to pay the family expenses from the account. In 1997, Kontrick filed for bankruptcy. The bankruptcy court found that Kontrick should be denied discharge because Kontrick deposited his salary into an account on which his wife is the sole signatory, the money transferred into the account is fraudulently transferred to Carolyn because she gave no consideration, and Kontrick made the transfer with the intent to defraud his creditors. (Exh. 2, at 14.) The bankruptcy court recognized that generally the question of intent will prevent the grant of summary judgment, but that this was not the usual case because Kontrick's intent was clear.

Kontrick raises two grounds in this appeal. First, he argues that Ryan's claim that these deposits into the checking account were a ground to bar his discharge was untimely. According to Kontrick, Ryan filed an amended complaint adding the family account claim as an additional ground after the time for objecting to discharge had expired. Second, Kontrick argues that the bankruptcy court erred when it denied him discharge pursuant to § 727(a)(2) because the deposits

to the account were used for family expenses and did not reduce the assets available to creditors and because there was no intent to hinder, delay or defraud his creditors.

DISCUSSION

Timeliness Issue

Kontrick argues the family account claim was untimely because Ryan did not allege in the original complaint but only in the amended complaint that was filed outside the strict 60-day period for filing complaints pursuant to FED. R. BANKR. P. 4004(a) ("Rule 4004(a)"). He argues that the bankruptcy court's opinion failed to address the timeliness of the family account claim by wrongly finding that Kontrick had waived this issue by failing to raise it in his motion to strike. He claims that he did object to the timeliness of the family account claim in his motion to strike, and even if he did not the court wrongly found that he waived his objection because "Rule 4004 is jurisdictional and cannot be waived." (Kontrick Brief, at 10.)

This court will first address whether Kontrick raised his objection to the timeliness of the family account claim in his motion to strike. In his brief to this court Kontrick pieces together quotes and sentences from his motion to strike in an attempt to demonstrate that he made the argument to the bankruptcy court. The court has reviewed Kontrick's motion to strike and finds, like the bankruptcy court, that he did state that there were new allegations in the amended complaint that were not in the original complaint. But, as the bankruptcy court concluded in its memorandum opinion on Kontrick's motion to reconsider, Kontrick "mentions that this allegation was not included in the original complaint . . . [h]owever, he does not continue the argument to any logical conclusion. He never argued that the allegation was untimely or should be

struck for any reason." (Exh 11, at 6.) In Kontrick's motion to strike he compared the allegations in the complaint with the allegations in Ryan's motion for summary judgment, memorandum, and Rule 402M statement. The point of Kontrick's motion to strike was that "any allegations in the *[sic]* Ryan's [summary judgment] memorandum or 402M statement that are not tied to the complaint should be stricken" and not that there were new allegations in the amended complaint that were not in the original complaint. (Motion to strike, at 5.) This court agrees with the bankruptcy court that Kontrick did not raise this issue in his motion to strike.

As Kontrick did not argue that the family account claim was untimely, the court must next consider whether Kontrick's failure to raise it constitutes a waiver of his objection. With very little discussion, the bankruptcy court held that FED. R. BANKR. P. is not jurisdictional but more akin to a statute of limitations, and thus, by not raising his argument that the checking account claim was untimely sooner, Kontrick waived it. (Exh. 11, at 6.)

Here, Kontrick argues that while the bankruptcy court's finding that Rule 4004 is not jurisdictional does find some support in case law, the majority of cases, especially those from this district, find that it is jurisdictional. He argues because Rule 4004 is jurisdictional, he could not have waived an objection to jurisdiction. To support his argument that Rule 4004 is jurisdictional, Kontrick relies heavily on *In re Kirsch*, 65 B.R. 297, 302 (Bankr. N.D. Ill. 1986). In *Kirsch*, Judge Ginsberg found that the defendant, who had answered the complaint and participated in the trial, did not waive his objection to the timeliness of the complaint because the time limit was jurisdictional and thus could not be waived. *Id.* at 302. Kontrick argues that the bankruptcy court erred

when it declined to follow *Kirsch* and the "majority" of courts and instead found that the time limit for discharge objections was not jurisdictional.

As a preliminary matter, discharge and dischargeability are governed by distinct procedural rules. Rule 4004 sets out the procedure for granting or denying discharge under § 727. Rule 4007 governs the determination of dischargeability of a debt under § 523. Both Rule 4004(a) and Rule 4007(c) set forth a strict 60-day deadline for filing a complaint and both rules permit the court to extend the 60-day limit during the initial 60-day period. Further, Rule 9006(b)(3) states that "[t]he court may enlarge the time for taking action under Rules . . . 4004(a) and 4007(c) . . ., only to the extent and under the conditions stated in those rules." Thus, once the 60 days permitted by Rule 4004(a) or 4007(c) have passed, the bankruptcy court cannot extend the time for filing a complaint.

Here, after several extensions of time, Ryan filed his complaint within the 60-day period, but he filed an amended complaint after the 60-day period. Kontrick argues that the family account claim appears for the first time in the amended complaint, while Ryan argues that it was in the original complaint and he just expanded his factual allegations in the amended complaint. The bankruptcy court found that Kontrick waived his objection without a specific finding that the family account claim was timely or not.

Several bankruptcy courts have held that the time limit for filing dischargeability complaints fixed by Rule 4007(c) is jurisdictional, and thus not subject to waiver. *See In re Glover*, 212 B.R. 860, 861 (Bankr. S.D. Ohio 1997); *In re Ham*, 174 B.R. 104, 106-107 (Bankr. S.D. Ill. 1994); *In re Barley*, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991); *In re Booth*, 103 B.R. 800, 802 (Bankr. S.D. Miss. 1989); *In re Krause*, 114 B.R. 582, 605 (Bankr. N.D. Ind.

1988); *In re Kirsch*, 65 B.R. 297 (Bankr. N.D. Ill. 1986). These cases base their holding that the time limits for filing dischargeability complaints fixed by Rules 4007(c) and 9006(b)(3) are jurisdictional on a finding that this was Congress' intention in drafting the bankruptcy code. These courts argue that this interpretation "accords with the general rule that discharge and dischargeability law and procedure is to be interpreted strictly against creditors and in favor of debtors to promote a debtor's fresh start." *Kirsch*, 65 B.R. at 302-303.

Here, the bankruptcy court, while acknowledging *Kirsch* as the ringleader of the bunch, declined to follow that line of cases and instead cited *European American Bank v. Benedict (In re Benedict)*, 90 F.3d 50 (2nd Cir. 1996) and *Dombroff v. Greene (In re Dombroff)*, 192 B.R. 615 (S.D.N.Y. 1996). The bankruptcy court explained that "[c]ontrary to the Debtor's assertion, this court does not believe the limitations period of FED. R. BANKR. P. 4004 is jurisdictional, but is more akin to a statute of limitations." (Exh. 11, at 6.)

In *Benedict*, the Second Circuit acknowledged the split of authority on this issue and held that the time period imposed in Rule 4007(c) was not jurisdictional and thus subject to waiver, estoppel, and equitable tolling. The *Benedict* court reasoned that statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling, there was nothing in the Bankruptcy Code that supports a finding that Rule 4007 is any different from a statutory provision that imposes a filing deadline, and there is no controlling policy goal that would be served by holding Rule 4007(c) jurisdictional. *Benedict*, 90 F.3d at 54. Further, in *In re Santos*, 112 B.R. 1001, 1008 (Bankr. 9th Cir. 1990), the Ninth Circuit held that "the timeliness of a dischargeability complaint presents an affirmative defense

that must be raised in an answer or responsive pleading . . . If the defense is not raised in the answer or responsive pleading, it is generally waived." Further, in *Farouki v. Emirates Bank International Limited*, 14 F.3d 244, 248 (4th Cir. 1994), the Fourth Circuit found *Santos* to be well reasoned and followed it, specifically finding that Rule 4004(a) is not jurisdictional. *See also, Dombroff*, 192 B.R. 615 ("this Court holds that the time period fixed by FED. R. BANKR. B. 4004 is not jurisdictional in nature."); *In re Begue*, 176 B.R. 801, 804 (Bankr. N.D. Ohio 1995) ("This court thus joins other courts that have viewed the deadline set forth in B. R. 4007(c) not as jurisdictional but rather as a statute of limitations. As such, this statutory filing deadline is subject to the defenses of waiver, estoppel and equitable tolling." (citations omitted)); *In re Welsh*, 138 B.R. 630, 631 (Bankr. M.D. Fla. 1992) (holding that Rule 4007(c) is procedural and not jurisdictional).

Further, other courts, while not explicitly holding that Rule 4004 was not jurisdictional, permitted equitable relief where the court misled the parties as to a filing deadline. *See, e.g., In re Themy*, 6 F.3d 688, 690 (10th Cir. 1993) (holding that when "the court's act affirmatively misleads the creditor as to a deadline . . . the bankruptcy court [is] within its authority to accept [the creditor's] complaint after the sixty-day period expire[s]"); *In re Kennerley*, 995 F.2d 145, 148 (9th Cir. 1993) (holding that a late filed complaint objecting to discharge may be allowed when a court explicitly misleads a party as to a deadline). Since equitable considerations cannot excuse a jurisdictional defect, these cases lend further support that Rule 4004(c) is not jurisdictional.

Although Kontrick argues that the bankruptcy court adopted the "minority" approach, this court disagrees. While the Seventh Circuit has not spoken on

this issue, the court finds the authority from the Second, Fourth, and Ninth Circuits persuasive and follows it. By not raising the timeliness of the family account claim in his responsive pleading, Kontrick waived the objection. Therefore, Kontrick waived his argument that the family account claim was untimely.

The Family Account Claim

Kontrick argues that the bankruptcy court's grant of summary judgment to Ryan on the family account claim in Count I was erroneous. In order to deny a debtor a discharge under § 727(a)(2)(A) the objecting party must establish that: (1) the act complained of was done at a time subsequent to one year before the date of the filing of the petition; (2) the act was done with the actual intent to hinder, delay, or defraud a creditor; (3) the act was that of the debtor; and (4) the act consisted of transferring, removing, destroying or concealing of the debtor's property or permitting any of these acts to be done. *In re Agnew*, 818 F.2d 1284, 1287 (7th Cir. 1987). Further, "[i]n order to justify the refusal of discharge under a section 727(a)(2) transfer, it must be shown that there was an actual transfer of valuable property belonging to the debtor which reduced the assets available to creditor and which was made with fraudulent intent."' *Id*. at 1289, *citing*, *4 Collier on Bankruptcy*, para. 727.02[5] at 727-21 to -22 (15th ed. 1986).

The bankruptcy court acknowledged that Kontrick took his name off of the checking account in 1993, which was outside the one year statutory period, but stated that Kontrick has continued to deposit his paycheck into the account that still bears only his wife's name. The bankruptcy court did not consider this as a "continuing concealment" because the transfers continued into the year prior to the time he filed for bankruptcy. (Exh. 2, at 14.) The bankruptcy court found that "[i]t is undisputed, even admitted, by Kontrick that

his salary is being deposited into an account on which his wife is the sole signatory. Any money transferred to this account is fraudulently transferred to [Kontrick's wife] because at the time of the transfer she gave no consideration." *Id.* (citations omitted). The bankruptcy court found that this evidence established three of the four elements for denial of discharge, and the only remaining question was whether Kontrick had actual intent to hinder, delay or defraud a creditor. The court explained that "[g]enerally, the question of intent will prevent the granting of summary judgment. This case, however, is not the usual case . . . [because] the Debtor's intent is clear." *Id.*

The bankruptcy court relied primarily on testimony from Kontrick's deposition pursuant to the 1993 citation to discover assets where Kontrick "freely admitted he transferred the bank account to Carolyn to prevent his creditors from attaching the funds." *Id.* at 14-15. In that deposition, Kontrick was asked why he made changes to the way he handled his personal finances, including taking his name off of the checking account, and he testified that "what prompted this change was the ridiculous maneuvers that you and your client [Ryan] have put me through in order to collect money which you don't have coming to you." *Id.* at 15. Further, the court cited testimony where Kontrick stated that he changed his finances because "[y]ou can spend your whole life working and then have some client who - some person out there who feels that he is entitled to your money because of some perceived wrong that they claim you have done, and they are then in a position to basically rob you of your life savings." *Id.* He further stated that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So, I felt that this was a way of protecting myself." Last, the bankruptcy

court cited testimony where Kontrick stated that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything. In general, I have made an effort to not have any assets in my name." *Id.* Based on all of this testimony, the bankruptcy court found that "[Kontrick's] course of conduct coupled with his testimony proves beyond question that he intended to hinder, delay, or defraud at least Ryan and there can be no doubt that Kontrick, among his other acts, changed his finances and transferred the funds to his wife's account to hinder and delay, and prevent his creditor, Ryan, from collecting his judgment." *Id.* at 16. Thus, the bankruptcy court concluded that Kontrick's discharge must be denied pursuant to § 727(a)(2).

In its opinion on the motion for reconsideration, the bankruptcy court again stated that " [t]here can be no question that the Debtor acted in a manner which violated the statute. . . . Although he may have had the means to pay Ryan, he chose to take his name off of the account and began to pay his earnings into an account over which he had no control." (Exh. 11, at 8.)

The bankruptcy court's grant of summary judgment is a conclusion of law subject to *de novo* review. *In re Jones*, 226 F.3d 917, 920 (7th Cir. 2000). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "The standard governing summary judgment is clear: '[I]f no rational jury could, on the evidence presented in the summary judgment proceeding, bring in a verdict for the party opposing summary judgment . . . then summary judgment must

be granted.'" *Oates v. Discovery Zone*, 116 F.3d 1161, 1175 (7th Cir. 1997) (citing *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 660 (7th Cir. 1991)).

It is well-recognized that "'exceptions to discharge are to be constructed strictly against a creditor and liberally in favor of the debtor.'" *Goldberg Securities, Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992) (quoting *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985)). Denial of discharge under § 727(a)(2)(a) requires proof of actual intent to hinder, delay, or defraud a creditor. *In re Smiley*, 864 F.2d 562, 566 (7th Cir. 1989). In determining whether a debtor has acted with intent to defraud, courts should consider the debtor's whole pattern of conduct, and actual fraudulent intent can be inferred from extrinsic evidence. *Id*.

First, Kontrick asserts that under Seventh Circuit law only a transfer that reduces the assets available to creditors will bar discharge, and that here the bankruptcy court's opinion does not refer to any specific deposits to the account that actually reduced assets available to Kontrick's creditors but instead merely stated that it was "axiomatic" that a transfer from a husband to a wife affects creditors because funds are no longer available. (Kontrick Brief, at 20.) Kontrick deposited his salary into an account that he could not access; there is no question that this transfer reduced the assets were available to his creditors.

Second, Kontrick argues that the bankruptcy court erred by finding an intent to hinder, delay, or defraud in the year before bankruptcy. Kontrick argues that he removed his name from the account in 1993, which was four years before he filed for bankruptcy, and that the citation to discover assets relied upon by the bankruptcy judge also occurred in 1993. He further argues that at the time he made those statements, he was solvent and was able to pay his debts.

It is undisputed that Kontrick took his name off of the account in 1993. After acknowledging that this fact that Kontrick took his name off of the account in 1993 alone is insufficient to bar discharge because it was outside the one year statutory period, the court noted that Kontrick continued to deposit his paycheck into the account which now bears solely his wife's name in the year right before he filed for bankruptcy. The court explained that "[b]ecause the transfers continued into the year prior to filing for bankruptcy, this court need not determine whether there is a continuing concealment." (Exh.2, at 13, fn. 19.) The court found that "[a]ny money transferred to this account is fraudulently transferred to Carolyn because at the time of the transfer she gave no consideration." After explaining that the question of intent typically prevents the granting of summary judgment, the bankruptcy court held that "[t]his case, however, is not the usual case [because] the Debtor's intent is clear." (Exh. 2 at 14.) The bankruptcy court relied on Kontrick's testimony at the citation to discover assets and his offer of a global settlement with his other creditors besides Ryan. Further, in its opinion denying reconsideration, the bankruptcy court explained that even without the offer of a global settlement, there was sufficient evidence to grant summary judgment.

Considering Kontrick's statements at the citation and his whole course of conduct, the bankruptcy court's finding that Kontrick's intent was clear was appropriate. Kontrick points to no evidence, sworn affidavits, or anything else providing an alternative explanation to why he removed his name from the checking account and continued to deposit his salary into an account that he did not have access to. Instead of paying his creditors, Kontrick purposely put his money where Ryan and his other creditors could not reach it -- and he testified to that under oath. Consider-

ing Kontrick's whole pattern of conduct, the bankruptcy court properly found that Kontrick had the intent to hinder, delay or defraud his creditors. *See In re Chavin*, 150 F.3d 726, 729 (7th Cir. 1998). The court has considered Kontrick's other arguments and finds that they lack merit.

The bankruptcy laws are intended to give a fresh start to the honest but unfortunate debtor. *See Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966 (7th Cir. 1999), *citing Grogan v. Garner (In re Garner)*, 498 U.S. 279, 286-87, 111 S. Ct. 654 (1991). Discharge is a privilege, not a right, and the bankruptcy court properly denied it here.

CONCLUSION

For the foregoing reasons, the bankruptcy court's grant of summary judgment on Count I is affirmed.

IT IS SO ORDERED.

_____

Harry D. Leinenweber, Judge
United States District Court

Date: _____

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOISEASTERN DIVISION

In re:	)	Chapter 7
	)	
Andrew J. Kontrick, M.D.,	)	No. 97 B 10353
	)	
Debtor	)	Honorable
	)	John D. Schwartz
	)	
	)	
Robert A. Ryan, M.D.,	)	
	)	
Plaintiff,	)	
	)	Adversary No. 98 A 113
v.	)	
	)	
Andrew J. Kontrick, M.D.,	)	
	)	
Defendant.	)	

AMENDED MEMORANDUM OPINION

There are two matters presently before the court. The first is Dr. Robert Ryan's ("Ryan") Motion for Summary Judgment seeking to bar Dr. Andrew Kontrick ("Kontrick") from receiving his discharge pursuant to §§ 727 (a)(2), (3), (4) and (5).[5] Second is Kontrick's Motion to Strike portions of Ryan's 402(M) statement and certain of the attached exhibits.

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[1] Unless otherwise stated, an statutory references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 - 1330. Ryan's adversary complaint also sought to determine the dischargeability of certain debts pursuant to § 523. Those counts are being held in abeyance until the § 727 issues are determined.

On April 4, 1997, Kontrick filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code ("Code"). On January 13, 1998, Ryan filed his original adversary complaint with this court. The complaint consisted of seven counts, four seeking to deny Kontrick his discharge pursuant to § 727 (a)(2), (3), (4), and (5).[6] The latter three counts of the complaint sought a finding that Kontrick's debt to Ryan was nondischargeable pursuant to § 523 (a)(2), (4), and (6).[7] On February 12, 1998, Kontrick answered the complaint. On May 4, 1998, Ryan sought and was granted leave to file his amended complaint and on May 6, 1998, he did so. The amended complaint sought the same relief as the original complaint and contained the same seven counts as the original complaint. The two complaints differed only in certain factual allegations. On June 10, 1998, Kontrick answered the amended complaint.

After reviewing the briefs and exhibits filed with the court, case law, and the Federal Rules of Evidence (hereinafter "Fed. R. Evid."), the Motion for Summary Judgment is granted as to the §727(a)(2) count (Count I) and denied as to the remainder, and the Motion to Strike is granted in part and denied in part.

BACKGROUND[8]

Ryan, prior to his affiliation with Kontrick, had established a private plastic surgery practice. In 1985[9]

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[2] Count I is pursuant to § 727(a)(2), Count II is pursuant to § 727(a)(3), Count III is pursuant to § 727(a)(4), and Count IV is pursuant to § 727(a)(5).

[3] Count V is pursuant to § 523(a)(2), Count VI is pursuant to § 523(a)(4), and Count VII is pursuant to § 523(a)(6).

[4] The facts as recited were taken from Ryan's 402(M) statement. Because the Motion to Strike will be denied in part, the facts which were not struck or denied are deemed admitted and form the factual basis for the Motion for Summary Judgment.

Ryan hired Kontrick to join the practice as an employee. As time progressed, Ryan offered Kontrick an ownership share in the practice. Kontrick at first refused, but in 1989 he joined Ryan as a 50% shareholder. Setting forth the terms of their relationship were a stockholders' agreement, an employment agreement, and a compensation agreement, all of which functioned as one contract.[10] Ryan alleged that Kontrick breached each of the forgoing agreements and submitted his claims to arbitration in December of 1991. The arbitration was commenced in January of 1992 ("First Arbitration").

The First Arbitration resulted in an award to Ryan of $47,157.81 plus interest and attorneys' fees. Kontrick sought to modify the award, but in 1993 it was affirmed. In April 1993, Ryan offered to settle the First Arbitration, the October 1992 arbitration[11] ("Second Arbitration"), and other pending litigation between Ryan and Kontrick for $96,501.65.[12] The offer was rejected by Kontrick. In July of 1993 Kontrick paid Ryan $58,915.32 and in September of 1993 Kontrick paid Ryan $6,346, both in satisfaction of the First Arbitration award and attendant fees and costs. See Appendix to Statement of Facts in Opposition to Motion for Partial Summary

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[5] In Kontrick's memorandum in opposition to summary judgment e asserts that he worked with Ryan beginning in 1983. For this court's purposes, the discrepancy is irrelevant.

[6] Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment, ¶16 at 4.

[7] This will be discussed further in the following paragraph.

[8] Kontrick and Ryan are involved in additional litigation in Lake County, Illinois. The case is captioned Plastic and Cosmetic Surgery Associates, S.C. v. Andrew Kontrick, and is case number 91 CH 907.

Judgment and In Support of Cross Motion for Summary Judgment, ("Appendix") Exhibit C.[13]

The Second Arbitration proceeding against Ryan was commenced in October 1992.[14] In May of 1995, the arbitrator entered a net award for Ryan in the amount of $519,324.42 comprised of awards for compensatory damages for failure to pay rent, compensatory damages for breach of fiduciary duty, compensatory damages for breach of the three agreements setting forth each parties respective positions as shareholders, a credit to Kontrick for a division of income and for severance, punitive damages, costs and expenses, and attorneys' fees. Kontrick filed an affidavit with the Circuit Court of Cook County attesting to the fact that if the arbitration award were to "become a judgment" he would not have enough assets to satisfy the judgment and would be required to file for bankruptcy protection. Plaintiff's 402(M) Statement Exhibit 5. The arbitration award became final and Kontrick appealed the award to the Appellate Court of Illinois, First District. The Appellate Court affirmed in part, reversed in part, and remanded the cause to the Circuit Court for a determination of the proper amount due Ryan. The Appellate Court determined that Ryan should not have been awarded punitive damages, upheld the award of attorneys' fees, and reduced the prejudgment interest rate to 9% as imposed by state statute as opposed to the contract rate that was awarded by the arbitrator. The parties have

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[9] The court is holding the cross-motion for summary judgment in abeyance until the present motion for summary judgment is determined.

[10] Again, the amended complaint and 402(M) Statement conflict. The amended complaint states that Ryan initiated the Second Arbitration, but the 402(M) Statement states that the Debtor [Kontrick] initiated the Second Arbitration.

not supplied this court with a final determination of the total amount due.

In response to the First Arbitration award, and prior to its satisfaction, Ryan served Kontrick with a citation to discover assets. Much of the underlying behavior and activity complained of was initially discovered during this citation to discover assets. It is also many of these allegations that Kontrick is seeking to strike as being untimely because they were not included in the amended complaint.

Ryan, in his 402(M) statement, quotes liberally from the transcripts of the hearing on the citation to discover assets. During this examination Kontrick made certain statements regarding his personal finances. The statements were, in no uncertain terms, that Kontrick did everything he could think of to divest himself of any assets which any creditor, including Ryan, could recover to satisfy any judgment. Specifically Kontrick admitted to taking his name off the joint checking account shared with his wife, transferring his Lake Forest home into tenancy by the entireties, transferring his half interest in a condominium located into Gurnee to his wife, and transferring title of a car to his daughter. See Plaintiff's 402(M) Statement Exhibit 7.

In his 402(M) statement Ryan sets forth 12 transfers which he contends support the denial of Kontrick's discharge pursuant to § 727(a)(2).[15] The 12 transfers are set forth as follows: 1) the transfer of the Lake Forest House, 2) the Lake Forest home furnishings, 3) Gurnee Condominium, 4) Transfers to children, 5) Design Studio, 6) transfers of checks to Carolyn Kontrick totaling $811,239.17 and "I took my name off the checking

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[11] Ryan's § 727(a)(2) claims is set forth in Count I of the amended complaint.

account for one and only one reason", 7) transfers from the Debtor's payroll registers, 8) transfer of salary checks to Carolyn Kontrick on a year by year basis, 9) transfer of $18,408.22 to Carolyn Kontrick as salary for 1995, 10) transfer of $5,000 in bonus money to Carolyn Kontrick in 1997, 11) transfers to debtor's daughter, Marie, and 12) transfers to retirement plan. See Plaintiff's 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment. These transfers can be categorized into two basic groups, actions which Kontrick took to shield his income and assets from Ryan and Kontrick spending money in ways that Ryan deems inappropriate. The specific instances and facts are not germane except to say that Kontrick transferred an extensive amount of property away from himself and to his wife and children.

Kontrick also started to pay his creditors with cash, cashier's checks, or money orders. This was to prevent any of his suppliers or employees or others to whom he paid money from presenting a check which would be dishonored. It also, according to Kontrick, prevented the money from being recaptured by his bankruptcy estate should he file for bankruptcy protection. See Plaintiff's 402(M) Statement Exhibit 111 at 16.

Ryan also sets forth 8 false oaths which he alleges can sustain a denial of discharge under § 727(a)(4).[16] They are as follows: (1) Carolyn Kontrick began working for the corporation in the summer of 1995, (2) Carolyn's 1995 W-2 is accurate, (3) no money available to put into retirement plan in 1995, (4) the debtor stated that the only reason for putting his salary checks into Carolyn's name was that he had no check-

[12] Ryan's § 727(a)(4) claims is set forth in Count III of the amended complaint.

ing account, (5) the debtor said that he was not concerned about creditors when he transferred the Gurnee condominium, (6) the bathroom renovation was done because of a leaky shower causing water damage, (7) the debtor stated that other than the transactions outlined in the Voelz letter there were no other checks written to the retirement plan, and (8) the debtor stated that he made third party payment on the advice of his accountant. See Plaintiff s 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment.

Ryan also proffers 10 reasons why Kontrick should be denied his discharge pursuant to § 727(a)(3) for failure to properly keep records.[17] Each of the 10 is set forth as follows: (1) the caregiver, (2) credit cards, (3) failure to account for $60,000 of discrepancies in checks written within one year of filing bankruptcy, (4) failure to account for LFB&T (Lake Forest Bank & Trust) checks, (5) failure to produce checks, (6) failure to disclose the service corporation's year to date general ledger, (7) impossibility of balancing corporate monthly statements (statements of revenue collected and expenses paid), (8) failure to disclose inflows and outflows from retirement plan, (9) failure to obey a lawful order of the court regarding turning over the 1995 appointment book, the 1995 insurance forms and 1995 bills, and (10) failure to obey a lawful order of the court and raising the cost of litigation by not disclosing that the 1992 appointment book was "lost." See Plaintiff's 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment.

[13] Ryan's § 727(a)(3) claims is set forth in Count II of the amended complaint.

Ryan also alleges that Kontrick should be denied his discharge pursuant to § 727(a)(5) for failure to provide an adequate explanation for the dissipation of his assets.[18] These are basically duplicative of other reasons Ryan asserts that Kontrick should be denied his discharge. The reasons propounded by Ryan are: (1) what happened to the checks paid to Lake Forest Bank and Trust, (2) what happened to the unsubstantiated payments to the credit card companies, and (3) what happened to the payments allegedly made to the caregiver for Dr. Kontrick's mother. See Plaintiff's 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment.

DISCUSSION

Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

Bleak House, Charles Dickens, Chapter 1

Motion to Strike

Kontrick seeks to strike portions of the Motion for Summary Judgment and appurtenant 402(M) statement because they could not properly be pled as part of a new or amended complaint. See Fed. R. Bank. P. 4004, 4007. He alleges that allowing Ryan to include these allegations in the 402(M) statement is tantamount to allowing Ryan additional bases for a determination of whether or not Kontrick should be denied his discharge. He also argues that Ryan has failed to provide a proper foundation for the documents and summaries he produced to the court. And, without the proper foundation, they are not admissible and must be struck. See generally Fed. R. Evid. 901. Kontrick also proffers a

[14] Ryan's § 727(a)(5) claims is set forth in Count IV of the amended complaint.

general objection that many of the documents are irrelevant and should be struck. Fed. R. Evid. 402.

Ryan argues that the allegations and document summaries are admissible and should not be stricken. He argues that he has established a proper foundation for the documents and summaries. He maintains that these summaries and documents are just summaries of documents which are themselves admissible. He also argues that Fed. R. Evid. 1006 permits and encourages summaries to be produced to the court. Lastly, Ryan argues that the summaries and allegations in the 402(M) statements are relevant. See Fed. R. Evid. 401.

Fed. R. Evid. 401 states: "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Under this lenient standard, most of the paragraphs and exhibits which Kontrick is seeking to strike from Ryan's 402(M) statement are relevant. Nor is the evidence precluded by Fed. R. Evid 403. Although Kontrick disputes the veracity of the documents and summaries, these objections do not rise do the level where the probative value is substantially outweighed by unfair prejudice, confusion, or misleading the jury, or by undue delay, waste of time, or cumulative evidence. Fed. R. Evid. 403.

The additional allegations not included in the amended complaint cannot be admitted as additional counts or reasons for denying Kontrick his discharge because they were not timely filed. See Fed. R. Bankr. P. 4004; Shanahan v. City of Chicago, 82 F.3d 776 (7th Cir. 1996)(stating plaintiff may not amend his complaint through arguments in brief in opposition to motion for summary judgment); Toth v. Ham (In re Ham), 174 B.R. 104 (Bankr. S.D. Ill. 1994) (finding that un-

timely amendments to a complaint are prohibited); Flexi-Van Leasing, Inc. v. Perez (In re Perez), 173 B.R. 284 (Bankr. E.D.N.Y. 1994) (stating that time limitations under Rule 4004(a) are strictly construed.) To that extent, Kontrick is correct. However, the court will allow certain of the allegations pursuant to Fed. R. Evid. 404 as evidence of other acts to show intent, plan, or knowledge. Fed. R. Evid. 404(b). These acts go to show that is more likely than not that Kontrick acted with intent, a plan, or knowledge about the activities he was undertaking. However, this court will not explicitly discuss any grounds for the denial of Kontrick's discharge other than those set forth in the amended complaint.[19]

The court will, however, strike all material and exhibits which are not necessary as proof of the claims set forth in the amended complaint and which are not relevant to prove Kontrick's intent, plan, or knowledge.

The court will first review the false oath accusations. In Count III of the amended complaint, Ryan sets forth two allegations of false oaths which he feels should bar the debtor from receiving his discharge. These allegations are (1) that the Debtor stated Carolyn, his wife, started working for him in the summer of 1995 and (2) that there was no money to pay into the retire-

[15] It should be kept in mind that Ryan knew, or should have known, that many of the basis for his motion for summary judgment are specious. It is difficult to prove the requirements of the subsections of § 727 based solely upon pleadings and affidavits and Ryan's motion for summary judgment rests on allegations many of which require proof of intent. This is an example of how Ryan obfuscated the issues and literally became the "tail that wagged the dog." It should also be noted that Ryan's counsel apparently permitted him to take control of this case and compound and increase exponentially the workload for his attorney, Kontrick and his attorney, and this court.

ment plans in 1995. Ryan's 402(M) statement contains 6 additional allegations of false oaths which are set forth above. Each false oath is a distinct occurrence. The mere fact that Kontrick may have uttered a false oath on one occasion is not probative of whether or not he uttered a second false oath at a different time in regards to a distinct issue. The only thing that allowing additional evidence would do is to show that it is more likely than not that Kontrick is a liar, in other words, character evidence. Even if this were the case, it is not permissible evidence under Fed. R. Evid. 404. Although Fed. R. Evid. 404 permits character evidence to be used for purposes other than to show a person's character and actions in conformity therewith[20], in this case the court doubts the value of the alleged additional false oaths for any purpose other than that prohibited by Fed. R. Evid. 404. Therefore, all references to false oaths in the 402(M) statement that are not related to the two set forth in the amended complaint will be struck. Paragraphs 200 - 206 dealing with the false oath regarding Carolyn's W-2 will be struck from the 402(M) statement because this allegation was not included in the amended complaint. Paragraphs 214 - 234 will also be struck because none of the paragraphs reference an allegation contained in the amended complaint.

Ryan also alleges that Kontrick has failed to produce documents or has delayed in accounting for his income. Ryan first alleges that Kontrick has failed

[16] Federal Rule of Evidence 404 (b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . Fed. R. Evid. 404 (b)

to produce any records or otherwise properly account for payments made to his mother's caregiver. The amended complaint does not reference the caregiver. Accordingly, paragraphs 235 - 239 of the 402(M) statement will be struck. Paragraphs 252 - 285, pertaining to failure to produce or account will also be struck because they do not relate to any corresponding allegation in the amended complaint and are not probative of Kontrick's intent, plan, or knowledge.

Paragraphs 292 - 331 set forth a count under § 727(a)(6) to deny Kontrick his discharge. No § 727(a)(6) count was included in the amended complaint. These allegations related to what Ryan sees as discovery abuses. If Ryan was unhappy with Kontrick's responses, or lack thereof, to discovery he propounded, he should have brought the matter to the court's attention by means of a motion.[21]

The court will allow the document summaries. Fed. R. Evid. 1006 provides that evidence "may be presented in the form of a chart, summary, or calculation." Fed. R. Evid. 1006. It is axiomatic that to be admitted as evidence, the underlying documents must be admissible. Fed. R. Bankr. P. 7056; See United Phosphorus, Ltd. v. Angus Chemical Co., No 94 C 2078, 1996 WL 14036 (N.D. Ill. 1996) (stating that evidence supporting a motion for summary judgment must be admissible). As part of this showing, the person or party that prepared the documents must show that the appropriate steps were taken to ensure their accuracy and completeness. Ryan prepared, although not in a timely manner, an affidavit attesting to how he produced the

[17] On numerous occasions Ryan did just that, so there is no logical reason why he suddenly got shy and did not seek this court's intervention to resolve these issues. It is clear that they cannot stand to bar Kontrick's discharge because they cannot be properly added to the amended complaint at this late juncture.

summaries and that to the best of his knowledge they were accurate. This court struck his first affidavit because it contained settlement discussion information which should not have been brought to the court's attention.[22] The court accepts Ryan's amended affidavit and will review the summaries he prepared.

Motion for Summary Judgment

Summary judgment is governed by Federal Rule of Civil Procedure 56 made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. Fed. R. Civ. P. 56; Fed. R. Bankr. P. 7056. Summary judgment can only be granted if there is no genuine issue of material fact. Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574,585 (1986). This showing requires more than a metaphysical doubt as to the material facts. Id. at 585. The evidence is not to be weighed, but only used to determine if a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). All inferences must be drawn in favor of the non-moving party. Matsushita, 475 U.S. at 587.

Section 727(a) of the bankruptcy code provides a debtor is entitled to a discharge unless certain enumerated exceptions exist. In re Juzwiak, 89 F.3d 424 (7th Cir. 1996). The exceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor. Id. at 427. It is also important to remember that a discharge is a privilege not a right and should only benefit the honest debtor. Id. citing In re Frommann, 153 B.R. 113 (Bankr. E.D.N.Y. 1991).

[18] The court never reviewed the affidavit in question. It was reviewed by this court's law clerk and struck without being read by the court.

Section 727(a)(2), Count I

Section 727(a)(2) bars a debtor from receiving his or her discharge if he or she, "with intent to hinder, delay, or defraud a creditor has transferred, removed, destroyed, mutilated, or concealed property of the estate within one year prior to the filing of the petition." 11 U.S.C. § 727. A denial of discharge under this section requires proof of actual intent to hinder, delay, or defraud a creditor. Davis, Mannix & McGrath v. Fawell (In re Fawell), No. 98 A 01306, 1999 WL 569449 (Bankr. N.D. Ill. July 26, 1999) citing In re Snyder, 152 F.3d 596 (7th Cir. 1998). Intent should be determined by considering the debtor's "whole pattern of conduct" Id. at *5 quoting Bennett & Kahnweiler Assocs. v. Ratner (In re Ratner), 132 B.R. 728, 731 (N.D. Ill. 1991). Proof of harm is not required. Id. at *5.

Kontrick, on numerous occasions, admits to transferring assets from himself to his wife. He further admits transferring the property to protect himself from his creditors. See Plaintiff's 402(M) Statement Exhibit 109 at 33; see generally Plaintiff's 402(M) Statement Exhibit 111 at 4; Plaintiff's 402(M) Statement Exhibit 7. These transfers commenced prior to the year immediately proceeding the commencement of Kontrick's bankruptcy. However, many of these actions continued into the period within a year of his bankruptcy filing. In his amended complaint Ryan alleges numerous incidents which he argues require this court to deny Kontrick his discharge pursuant to § 727(a)(2). The court will address each of these in turn.

First, Ryan seeks to bar Kontrick his discharge because he took his name off of the family bank account yet deposited his employment income to that account. Ryan alleges that this is a fraudulent transfer and Kontrick should not receive his discharge because of it. It should be noted that Kontrick took his name off

of the account in 1993. This standing alone cannot bar his discharge because it occurred outside the 1 year statutory period. 11 U.S.C. § 727. However, Kontrick has continued to deposit his paycheck into the account which now bears solely Carolyn's name.[23] This provides a basis for the court's determination that Kontrick will be denied his discharge pursuant to § 727(a)(2). It is undisputed, even admitted, by Kontrick that his salary is being deposited into an account on which his wife is the sole signatory.[24] Plaintiff's 402(M) Statement Exhibit 17 - 18. Any money transferred to this account is fraudulently transferred to Carolyn because at the time of the transfer she gave no consideration. This meets three of the four parts required for a determination that a debtor should be denied his or her discharge pursuant to § 727(a)(2). See Feldman v. Welch (In re Welch), Nos. 096-71550-511, 096-7279-346, 1998 WL 249175 (Bankr. E.D.N.Y. April 23, 1998) (Determining § 727(a)(2)(A) requires a four part test for determining whether a debtor should be denied his or her discharge).

The sole remaining question is Kontrick's intent. Generally, the question of intent will prevent the granting of summary judgment. This case, however, is not the usual case. Unlike the Ratner case, here the Debtor's intent is clear. Kontrick, during the deposition pursuant to the citation to discover assets, freely admitted he transferred the bank account to Carolyn to prevent his creditors from attaching the funds. Plaintiff's 402(M) Statement Exhibit 17 - 18; see In re Welch, 1998 WL 249175 at *3 (Determining that debtor's removal of

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[19] Because the transfers continued into the year prior to filing for bankruptcy, this court need not determine whether there is a continuing concealment.

[20] His wife, Carolyn, is not a debtor in the above captioned case.

his name from a bank account to prevent creditors from attaching the account could support a finding that the debtor be denied his discharge). When asked why he made changes to the way he handled his personal finances, including taking his name off of the account, Kontrick answered "what prompted this change was the ridiculous maneuvers that you and your client [Ryan] have put me through in order to collect money which you don't have coming to you." Plaintiff's 402(M) Exhibit 7 at 9. Kontrick also admitted that he changed the way he handled his personal finances because of Ryan's attempt to collect his award from the First Arbitration. Plaintiff's 402(M) Exhibit 7 at 9.

Kontrick stated another reason he changed his finances was "[y]ou can spend your whole life working and then have some client who - some person out there who feels that he is entitled to your money because of some perceived wrong that they claim you have done, and they are then in a position to basically rob you of your life savings." Plaintiff's 402(M) Statement Exhibit 7 at 13-14.

Also during the citation to discover assets Kontrick stated that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So, I felt that this was a way of protecting myself." Plaintiff's 402(M) Statement at 8.

Kontrick also stated during the citation hearing that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything. In general, I have made an effort to not have assets in my name." Id. at 9.

Further evidence of Kontrick's intent to hinder, delay, or defraud his creditors, specifically Ryan, is that he offered a global settlement with his other creditors

in which he would waive his discharge as to all of his creditors other than Ryan. The settlement was proposed by the Trustee in the multiple count adversary complaint he brought seeking to deny Kontrick his discharge.[25] By Memorandum Opinion and Order, of September 1, 1998, this court denied the Trustee's and Kontrick's request to waive Kontrick's discharge as to all his creditors except Ryan, determining that the settlement was not in the best interest of Kontrick's creditors and contrary to the spirit of the Code.[26] There is no question that the aggregate effects of Kontrick's behavior, up to the commencement of this case, was to hinder, delay, or defraud his creditors. His course of conduct coupled with his testimony proves beyond question that he intended to hinder, delay or defraud at least Ryan and there can be no doubt that Kontrick, among his other acts, changed his finances and transferred the funds to his wife's account to hinder and delay, and prevent his creditor, Ryan, from collecting his judgment. Accordingly, his discharge must be denied pursuant to §727(a)(2), pled as Court I of the amended complaint.

Ryan alleges that Kontrick paid the mortgage and real estate taxes on a condominium located in Gurnee, Illinois at which his mother resided. In response, Kontrick admits making the transfers, but argues that he is the court appointed legal guardian for his mother. As such he is responsible for the costs associated with her support, including the mortgage and real estate taxes on the condominium. Because this is a motion for summary judgment, all inferences must be drawn in favor of the non-moving party. Matsushita, 475 U.S. at 587. Because Kontrick is required, as his mother's legal

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[21] Gierum v. Kontrick, Nos. 97 B 10353,98 A 112

[22] Gierum v. Kontrick, Nos. 97 B 10353, 98 A 112 (Bankr. N.D. Ill. Sept. 1, 1998).

guardian, to pay her living expenses, this court cannot determine that the transfers with respect to the condominium were made with the intent to defraud Ryan.

Ryan next argues that Kontrick made payments to his wife, Carolyn, in excess of the value of services she rendered to his personal corporation. Kontrick argues that these payments were the fair value for the services rendered and were not fraudulent. Ryan, of course, alleges that Kontrick paid Carolyn money in excess of the value of services she provided to the corporation to shield the money from his efforts to collect his judgment. This is closely tied to the allegations that Kontrick has failed to properly account for his wife's salary and has not provided the relevant and appropriate documents to Ryan. These two allegations are necessarily mutually exclusive and because this court is unsure whether it has complete information it cannot determine whether there is a material question of fact. Even if the court does have all the relevant information this is purely a factual matter and is not appropriate for a determination on summary judgment on what is before the court.

Ryan's next argument is that Kontrick remodeled the bathroom in his home with certain luxury items and that this defrauded Ryan. Kontrick argues that the remodeling of the bathroom was a necessity because it was leaking into the basement. He further contends that even though pipes to later retrofit a steam generator were included in the remodeling, this was neither unusual for the area nor an excessive expense. Whether or not the remodeling was required and whether it was required to be undertaken in the manner that Kontrick pursued is a question of fact not appropriate for summary judgment.

Ryan's next allegation is that Kontrick made payments to his children in amounts not less that

$12,000. Kontrick first argues that any transfers made outside the one year period cannot be the basis to deny his discharge. He is correct. 11 U.S.C. § 727. He next argues that the transfers were made to help support his children. With respect to any transfers that fall within the year prior to the bankruptcy filing, this court is unable to determine Kontrick's intent. It is perfectly legitimate to provide funds to help support children. Without further proof, this court cannot grant summary judgment and deny Kontrick his discharge on this basis.

Ryan next attacks Kontrick's payments to his retirement plan. He alleges that certain payments were made to the retirement plan instead of him, a judgment creditor. Kontrick, in a cursory manner in his 402(N) statement, states that these transfers have already been explained and are proper. It is not this court's job to scour the record looking for evidence which will help exonerate Kontrick. Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995). However, although Kontrick may have contributed funds to his retirement account, and by doing that he may have defrauded his creditors or, at best, preferred himself over his creditors, the question of intent is still relevant. If Kontrick did not act with the requisite intent, this court cannot deny his discharge. The court cannot make a clear determination of Kontrick's intent on this issue from the record. There is the also the additional question as to when the transfers occurred. Any transfers that occurred prior to the year immediately preceding the bankruptcy filing cannot be the basis to deny Kontrick his discharge under § 727(a)(2). 11 U.S.C. § 727(a)(2). Accordingly, summary judgment is not appropriate.

Ryan also contends that Kontrick's payment of credit card bills in the amount of $49,805 was a fraudulent transfer. However, there is no corresponding alle-

gation in Ryan's 402(M) statement and it is therefore not before the court at this time.

Section 727(a)(3), Count II

Section 727(a)(3) bars a debtor from receiving his or her discharge if he or she

> has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

11 U.S.C. § 727(a)(3). The original burden of proof is on the plaintiff who must show that the debtor failed to maintain and preserve records and that such failure makes it impossible to determine the debtor's financial position. Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994). There is no requirement that the records be kept in a specific manner nor is there a rigid "standard of perfection in record-keeping mandated by § 727(a)(3)." In re Juzwiak, 89 F.3d at 429. However, it is not the responsibility of the trustee or creditors to sort through documents and reconstruct the debtor's assets. Peterson v. Scott (In re Scott), 172 F.3d 959, 969-70 (7th Cir. 1999). If Ryan can prove Kontrick's records are absent or inadequate, the burden of proof shifts to the Debtor and Kontrick must therefore justify the absence or inadequacy of the records. In re Cox, 41 F.3d at 1295.

The Seventh Circuit has also determined that there need be no proof of criminal conduct. There is no intent requirement under § 727(a)(3). In re Scott, 172 F.3d at 969. Where a debtor fails to maintain books or records from which his or her financial position can be

assessed, the debtor's discharge must be denied. Id. at 970.

Ryan would have this court believe that Kontrick has destroyed records or failed to properly keep records. Although Ryan proffered numerous exhibits and document summaries to support his position, the allegations were refuted by Kontrick's accountant. Kontrick's accountant attempts to explain away many of the apparent inconsistencies that Ryan "discovered." Many of these explanations revolve around the fact that he is able to reconcile the books because of various accounting methodologies and practices. See Affidavit of Dennis Voelz attached as Exhibit G to Defendant's Appendix to Statement of Facts in Opposition to Motion for Partial Summary Judgment. However, "it is well established in this Circuit that 'self-serving affidavits without factual support in the record will not defeat a motion for summary judgment.'" Patterson v. Chicago Assoc. for Retarded Citizens, 150 F.3d 719, 724 (7th Cir. 1998) quoting Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993)(citations omitted). Accordingly, Voelz's affidavit standing alone is not sufficient to withstand summary judgment.

Reviewing the voluminous documents supplied by Ryan, this court finds many of them to be confusing and replete with speculation. For example in reviewing Plaintiff's 402(M) Statement Exhibit 16, Ryan alleges that when Kontrick withdrew cash from the bank account either with a certified check, money order, or at an ATM machine, it was used to pay either personal or professional creditors. Although it is likely that he paid creditors in the sense that he paid someone for goods or services, Ryan has not proven this, it is mere speculation. Additionally, Ryan has made a determination, without offering supporting proof, how Kontrick spent the money. This court is not required to assist either

party prove its case and cannot give mere speculation any weight in reviewing a motion for summary judgment. Further, many of the documents submitted by Ryan contain illegible handwritten notations and markings which obscure the underlying information. Because in determining whether to grant a motion for summary judgment a court is bound to draw all inferences in favor of the non-moving party, summary judgment cannot be granted because on the record before the court, the court cannot determine whether the documents were properly kept or whether Kontrick did not produce them. There is therefore a question of material fact. Matsushita, 475 U.S. at 587.

Ryan further alleges that Kontrick has not been forthcoming in producing documents and has been delaying the production of certain documents that were requested. Kontrick argues that he has not refused to produce documents and that he has not intentionally delayed the production of any documents. Kontrick argues that he has given Ryan carte blanche to review his records and has cooperated to the fullest extent possible. Again, these are factual matters which cannot be determined from pleadings and 402(M) and (N) statements, this court will not grant summary judgment against Kontrick under §727(a)(3) which is Count II of the amended complaint.

Section 727(a)(4), Count III

> Section 727(a)(4) provides that a debtor shall not be granted a discharge if
>
> the debtor knowingly and fraudulently, in or in connection with the case -
>
> (A) made a false oath or account;
>
> (B) presented or used a false claim;

> (C) gave, offered, received, or attempted to obtain money, property or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
>
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

11 U.S.C. § 727(a)(4).

For Ryan to prevail on his § 727(a)(4) count, he must prove that (1) Kontrick made a statement under oath; (2) the statement was false; (3) Kontrick knew the statement was false; (4) Kontrick made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy. Bensenville Community Center Union v. Bailey (In re Bailey), 147 B.R. 157 (Bankr. N.D. Ill. 1992).

Ryan first alleges that Carolyn began working in Kontrick's office in 1996, but that Kontrick states she started working in 1995. The discrepancy appears to revolve around Carolyn's position. Kontrick states she worked in 1995, Ryan alleges she did not become office manager until February 1996. These are not necessarily mutually exclusive. Therefore, this factual question is not ripe for summary judgment.[27]

Ryan next attacks Kontrick's statement that there was no money available to pay into the retirement plan in 1995. He asserts that Kontrick made payments to the retirement plan during 1995. As support, Ryan proffers

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[23] There is also a factual question because although Ryan alleges Carolyn did not work for Kontrick until 1996, he uses her 1995 W-2 form as evidence of false oaths, the allegations of which have been struck from the 402(M) statement.

that payments made to Carolyn which were alleged to be salary were not included on her W-2 statement and were actually contributions to the retirement plan. Kontrick argues that he repaid loans to the fund and that the payments were made upon the instruction of his accountant. See Plaintiff's 402(M) Exhibit 37. He further argues that the payments were required to keep the retirement plan in good standing. See Appendix Exhibit G. He differentiates loan payments from contributions and argues that no payments were made to the plan during 1995.

Ryan provides summaries, charts, and canceled checks to support his allegations. However, with the exception of a few pieces of evidence, most are not relevant. Rather, the evidence shows that Voelz made some errors in accounting. The other evidence is for years other than 1995. For example, Ryan provides statements for the retirement account for 1993 and 1996. However, without 1995, the court cannot determine whether payments were made in 1995. Additionally, providing statements for 1994 and 1996 would allow this court to determine whether payments were made into the account by comparing the ending balance of 1994 with the beginning balance of 1996.[28] Somewhat disturbing to the court are two checks included as evidence by Ryan which show payments, by Kontrick, to the retirement plan on December 31, 1995. Plaintiff's 402(M) Exhibit 105. Ultimately, there is an underlying question which must be resolved. That question cannot be answered on a motion for summary judgment as it hinges on the language used by Ryan and Kontrick. The question is: were the two checks repayment of loans to the retirement plan or were they contributions?

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[24] Of course the arithmetic would be complicated by interest or dividend payments into the account.

Should there be a difference in this context? Although at best it may be semantics, the answer to the latter is yes. Unfortunately, as to the former, this is a question of fact which this court cannot determine on summary judgment, especially considering the errors pointed out by Ryan in the accounting prepared by Voelz. Plaintiff's 402(M) Exhibit 107.

Section 727(a)(5), Count IV

Lastly, Ryan is seeking to deny Kontrick his discharge pursuant to § 727(a)(5) for "failure to explain satisfactorily. . . any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). To prove his case, Ryan must provide evidence that Kontrick owned substantial and identifiable assets that are no longer available to his creditors. Bancflorida v. Depasquale, No 93 C 4488, 1993 WL 410152 (N.D. Ill. October 14, 1993). If Ryan can meet that burden, Kontrick is required to satisfactorily explain the loss. Davis, Mannix & McGrath v. Fawell (In re Fawell), Nos. 98 B 01274, 98 A 1306, 1999 WL 569449 (Bankr. N.D. Ill July 26, 1999). The explanation "'must consist of more than vague, indefinite, and uncorroborated assertions' by the Debtor." In re D' Agnese, 86 F.3d 732 (7th Cir. 1996) (citations omitted). Whether an explanation is satisfactory is left to the discretion of the court. In re Fawell, 1999 WL 56949 at *16.

The first allegation is that Kontrick has failed to properly explain the disposition of his income. This court is not sure that the disposition of income qualifies as "substantial and identifiable assets." 11 U.S.C. § 727(a)(5). If it does, however, the court is unable to grant summary judgment on this issue if it could not grant summary judgment on the issue of whether Kontrick has produced all the relevant documents pertaining to his financial situation. Without all the relevant documents the court is unable to determine whether or

not Kontrick can adequately explain the dissipation of assets, if a dissipation truly occurred. Because the court is not sure whether Kontrick has produced all the relevant documents (see the discussion on § 727 (a)(3) above) the court cannot grant summary judgment as to whether he dissipated assets.

The next allegation goes to the failure to produce documentation to substantiate an apparent $49,805 shortfall as determined by Ryan in an accounting he prepared. This is tied to the § 727 (a)(3) count based upon the failure to produce the records, and as such summary judgment will be denied.

CONCLUSION

Summary judgment will be granted on Count I of the adversary complaint and Kontrick's discharge will be denied pursuant to § 727(a)(2) for transferring or removing property with the intent to hinder, delay, or defraud his creditors. Counts II - VII of the adversary complaint will be dismissed.

The parties shall provide this court with the amount due Ryan on remand of the Second Arbitration, on or before March 21, so that judgment may be entered.

SANCTIONS

On its own motion, the court will set a hearing to determine what, if any, sanctions should be assessed against Ryan and his counsel for vexatiously multiplying the proceedings. See 11 U.S.C. § 105; In re Volpert, 110 F.3d 494 (7th Cir. 1997). In almost fifty years involvement in the legal profession, this court has seldom seen two parties with such animosity towards each other. Their dislike for each other is readily apparent even without the knowledge that they have had a physical altercation. At every turn Ryan and his counsel complicated these proceedings. From subpoenaing

Kontrick's mother's caregiver who speaks no English to improperly including settlement discussion in an affidavit produced to this court, Ryan and his counsel have sought and succeeded in multiplying these proceedings. This court is aware that Kontrick is not blameless in these matters. However, it is Ryan who was unbridled and thus exacerbated not only the whole of the proceedings, but in particular, the summary judgment motion with the myriad of documents to support the motion, much of which was doomed to failure. Such conduct cannot go unnoticed. The hearing will be set for March 21, 2000 at the hour of 2:00 p.m. The court will hear what evidence Ryan and Kontrick chose to present to the court on this matter only. Each party will be allowed one hour to present its side of this matter.

ENTERED:

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John D. Schwartz
United States Bankruptcy Judge

Date: March 8, 2000 n*unc pro tunc*
February 25, 2000

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In re:	)	Chapter 7
	)	
Andrew J. Kontrick, M.D.,	)	No. 97 B 10353
	)	
Debtor	)	Honorable
	)	John D. Schwartz
	)	
	)	
Robert A. Ryan, M.D.,	)	
	)	
Plaintiff,	)	
	)	Adversary No. 98 A 113
v.	)	
	)	
Andrew J. Kontrick, M.D.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the court on the motion of Andrew J. Kontrick ("Debtor") to reconsider this court's memorandum opinion ("Opinion") granting summary judgment for the plaintiff, Robert A. Ryan ("Ryan") and denying the Debtor his discharge and for consideration of other outstanding motions.[29] The

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[1] This court entered its original Memorandum Opinion on February 25, 2000, but on March 8, 2000 amended the opinion to correct a factual error and entered the amended Memorandum Opinion *nunc pro tunc* February 25, 2000. For the purposes of the motion for reconsideration the opinions will be referred to solely as the "Opinion."

Debtor asserts seven reasons the court erred in finding for Ryan. Of the seven reasons, the last two are only peripherally related to the reconsideration of the denial of discharge set forth in the Opinion: the consideration of the same transfers in a related adversary[30], and the Debtor's cross motion for summary judgment and motions for sanctions. As can be expected, Ryan suggests that this court was correct in denying the Debtor his discharge and counters each of Kontrick's allegations of error by this court. After reviewing both parties' briefs and the relevant case law, the motion will be denied.

BACKGROUND

On February 25, 2000, this court entered its Opinion which stated that the court would grant summary judgment on Count I of the adversary complaint in favor of Ryan and deny the Debtor his discharge pursuant to § 727(a)(2).[31] The Opinion denied summary judgment on three additional counts which were also seeking to deny the Debtor his discharge. On March 7, 2000, the Debtor filed a Motion To Reconsider Memorandum Opinion and For Consideration of Outstanding Motions ("Motion"). On March 8, 2000, the court amended the February 25, 2000, memorandum opinion to correct a scrivener's error. The March 8, 2000, memorandum opinion was entered *nunc pro tunc* February 25, 2000. Through no fault of the parties, at no time did this court enter a final judgment order denying the Debtor his discharge.[32]

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[2] The Trustee in the Debtor's bankruptcy is seeking to recover as fraudulent transfers, some of the payments which Ryan is contending should be the basis for denying the Debtor his discharge.

[3] Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 - 1330.

[4] It is abundantly clear what order would be entered.

DISCUSSION

This case is an unusual case because the court did not enter a final judgment order although it entered the Opinion which stated that the Debtor would be denied his discharge. Normally this would be accomplished by a final judgment order. For numerous procedural reasons, this court did not enter a final judgment order. However, because no final judgment order was issued a procedural quandary has arisen. Is the present Motion to be reviewed under Fed. R. Bankr. P. 9023 or 9024, or under a different standard?[33] In the Motion, the Debtor argues that a different standard should be used. In a footnote, he relies upon Acme Printing Ink Co., v. Menard, Inc., 891 F. Supp. 1289 (E.D. Wis. 1995) to assert that this court has the power and authority to review its order before the entry of a final judgment. However, Acme Printing deals with interlocutory orders. There are two problems with reliance on Acme Printing. The first is that no order was entered, neither an interlocutory order nor a final order. The second is that if an order had been entered it would have been a final order because it granted partial summary judgment and dismissed the remainder of the complaint. United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029 (6th Cir. 1999)(bankruptcy court orders granting summary judgment are final orders). Therefore, the Debtor's reliance on the Acme Printing case is misplaced.

This leaves only Fed. R. Bankr. P. 9023 or 9024 under which the Debtor can obtain the relief he is seeking. Neither rule is entirely appropriate because no or-

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[5] Fed. R. Bank. P. 9023 makes Fed. R. Civ. P. 59 applicable to bankruptcy proceedings and Fed. R. Bankr. P. 9024 makes Fed. R. Civ. P. 60 applicable to bankruptcy proceedings, with some exceptions enumerated in the Rule.

der was entered, either an interlocutory order or a judgment order. However, motions for reconsideration are not codified in the federal rules of civil procedure, so perhaps all is not lost. McNeela v. United Airlines, Inc., No. 98 C 1433, 1999 WL 987096 (N.D. Ill. Oct. 28, 1999), Lakeside Feeders, Ltd. v. Chicago Meat Processors, Inc., 35 F. Supp. 2d 638 (N.D. Ill. 1999). One court feels that motions for reconsideration are based in common law and serve a very limited function: "'to correct manifest errors of law or fact or to present newly discovered evidence.'" Lakeside Feeders, Ltd., 35 F. Supp. 2d at 640 citing Caisse Nationale De Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264, 1269 (7th Cir. 1996). And, "while it is true that any nonfinal decision or order is subject to revision at any time before the entry of judgment, Fed.R.Civ.P. 54(b), such revisions are discouraged. 'A court has the power to revisit prior decisions of its own ... in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."'" Budgetel Inns, Inc. v. Micros Systems, Inc. 34 F. Supp. 2d 720 (E.D. Wis. 1999)(citations omitted). This language is analogous to the language courts use to analyze motions brought under Fed. R. Civ. P. 59 to amend judgments. See Fed. R. Civ. P. 59; Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir. 1998); Moro v. Shell Oil Co., 91 F.3d 872 (7th Cir. 1996). This court will therefore use the case law interpreting Fed. R. Civ. P. 59 and Fed. R. Bankr. P. 9023 in determining the Motion. See In re Investors Florida Aggressive Growth Fund, Ltd., 168 B.R. 760 (Bankr. N.D. Fla. 1994)(treating motion to reconsider as motion under Fed. R. Bankr. P. 9023); In re Village Craftsman, Inc., 160 B.R. 740 (Bankr. N.J. 1993)(same).

Again, Fed. R. Bank. P. 9023 will be applied only if the moving party can establish a manifest error of

law or fact or can present newly discovered evidence. Moro, 91 F.3d at 876. Rule 9023 cannot be used to advance arguments not previously made or to relitigate old matters or advance new legal theories. Custom Cartage, Inc. v. Motorola, Inc., No. 98 C 5182, 1999 WL 1080607 (N.D. Ill. Nov. 24, 1999); McNeela v. United Airlines, Inc., No. 98 C 1433, 1999 WL 987096 (N.D. Ill. Oct. 28, 1999); A.V. Reilly Int'l, Ltd. v. Rosenzweig (In re Rosenzweig), 239 B.R. 905 (Bankr. N.D. Ill. 1999). A motion to reconsider allows a court to correct its own errors without the rigors of the appeal process. Russell v. Delco Remy Division of General Motors Corp., 51 F.3d 746 (7th Cir. 1995). It should not be brought by a party who "simply disagrees" with the court's original decision. In re Rosenzweig, 239 B.R. at 908. "In general, 'litigants must fight an uphill battle in order to prevail on a motion for reconsideration.'" Budgetel Inns, Inc., 34 F. Supp. 2d at 722.

As stated, the Debtor proffers seven reasons that this court should reconsider its Opinion. Of those, the last two can be dismissed out of hand. Reason number six is that this court should simultaneously rule on this matter and a related case which involves the Debtor's wife. Both sets of facts are similar and are based upon the same transactions. However, this is no reason to reconsider the courts prior Opinion. It does not meet even one criterion for reconsideration. Reason number seven is that this court should consider the Debtor's cross motion for summary judgment and motions to sanctions concurrently with the underlying summary judgment motion. Again, neither of the Debtor's motions are related to the Opinion and do not meet any of the criteria for determining whether a court should reconsider its prior decision. However, the court will take a moment to discuss these. Both the cross motion for summary judgment and both motions for sanctions will be denied. The cross motion for summary judgment

will be denied as moot because the court granted summary judgment on one count of the complaint and dismissed the others. For the same reason, the motions for sanctions, which sought dismissal as the sanction, will be denied.[34] However, the court's motion for sanctions is still pending and will be ruled upon at a later date.

The court will next address the Debtor's argument that this court has no jurisdiction over the count of the complaint on which it based its grant of summary judgment. The Debtor seeks reconsideration because, in his opinion, this court relied upon an allegation not included in the original complaint and although included in the amended complaint, was not timely. He is arguing that this court has no jurisdiction to deny his discharge on this basis because it was not timely brought. Contrary to the Debtor's assertion, this court does not believe the limitations period of Fed. R. Bankr. P. 4004 is jurisdictional, but is more akin to a statute of limitations. European American Bank v. Benedict (In re Benedict) 90 F.3d 50 (2nd Cir. 1996); Dombroff v. Greene, (In re Dombroff) 192 B.R. 615 (S.D. N.Y. 1996)(collecting cases regarding issue of whether or not Fed. R. Bankr. P. 4004 is jurisdictional; holding that it is not) compare Federal Deposit Insurance Core. v. Kirsch (In re Kirsch) 65 B.R. 297 (Bankr. N.D. Ill. 1986)(holding time limits under Rule 4004 are jurisdictional). Because the requirements of Fed. R. Bankr. P. 4004 are similar to a statute of limitations which can be waived, the requirements of Rule 4004 can also be waived.

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[6] The two motions for sanctions sought dismissal of the adversary complaint. One motion was grounded in Fed. R. Bank. P. 9011 and the other in the court's equitable power under § 105.

The Debtor is specifically arguing about his transfer of funds to his wife in the year immediately proceeding his bankruptcy. He argues that the allegation could not have been included in the amended complaint because it was barred by Fed. R. Bankr. P. 4004. He proposes that this allegation should have been struck when the court struck other allegations in the 402 (M) Statement. In his Motion to Strike, he mentions that this allegation was not included in the original complaint, but was included in the amended complaint. However, he does not continue the argument to any logical conclusion. He never argued that the allegation was untimely or should be struck for any reason. Rather, in his 402 (N) Statement he responded to the very allegations that he is now contesting this court's jurisdiction over. See Defendant's 402 (N) Statement at 13. This court read very carefully the Motion to Strike, and as evidenced by the Opinion, did indeed strike many allegations. It is not the court's responsibility to make a party's arguments on their behalf. Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995) see generally Tyler v. Runyon, 70 F.3d 458 (7th Cir. 1995); Ehrhart v. Sec. of Health and Human Services, 969 F.2d 534 (7th Cir. 1992). The Debtor failed to argue that the allegations added to the amended complaint should be stricken, and accordingly, at this point it is an argument "that . . . should have been presented" prior to this point and a theory that the party had the ability to raise in the first instance. Moro, 91 F.3d at 876, citing LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995); Russell, 51 F.3d at 749. It is this court's opinion that the Debtor waived his right to contest the timeliness of the allegation by not doing so prior to this Motion. Accordingly, the Motion is denied on this basis. The purpose of a motion to reconsider is not to give the moving party another bite at the apple. In re Rosenzweig, 239 B.R. at 908.

The Debtor's next argument is that this court failed to consider how the transfers reduced the funds available to creditors. It is axiomatic that if one transfers funds from himself to his wife, his creditors are affected because those funds are no longer available for them. To argue that there was no diminution of assets for his creditors because his wife paid all the bills and other expenses with these funds is unavailing. In this court's opinion, the Debtor's wife paying the bills was not consideration for the transfers and the transfers removed money from the Debtor's control so that his creditors could not reach the funds.[35] But see Michelson v. Schor, No. 93 C 5124, 1996 U.S. Dist. Lexis 16928 (N.D. Ill. Nov. 14, 1996).

The Debtor's next argument is that the transfers were not acts that hindered, delayed, or defrauded his creditors within one year of bankruptcy. To bolster his claim, the Debtor provides this court with case law from courts both inside and outside of this circuit. (In re Miller, 39 F.3d 301 (11th Cir. 1997); Michelson v. Schor, No. 93 C 5124, 1996 U.S. Dist. Lexis 16928 (N.D. Ill. Nov. 15, 1996)). He argues that his case is similar to these cases and these cases show that he could not have acted with the requisite intent to hinder, delay, or defraud Ryan, because others in similar circumstances were found not to have acted with the requisite intent. Relying on these cases, the Debtor argues that he should be allowed his discharge. Although each of these cases may be similar, none contains the facts of this case. There can be no question that the Debtor acted in a manner which violated the statute. This case,

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[7] Interestingly, the Debtor argues that his wife had always paid the bills from the account in question. See Defendant's 402 (N) Statement at 13. The difference is that originally the Debtor was a signatory to the account and had control over the funds, whereas he later had no control over the account.

as evidenced by the animosity between the parties and the ancillary and correlated litigation, is unlike anything the Debtor has found in the case law presented to the court.

Further, the Debtor argues that his financial condition at the time of the citations is relevant, not his financial condition afterwards. He argues that he had the financial wherewithal to easily pay Ryan the money he was owed. However, instead of paying Ryan, the Debtor chose to shield his income and assets which began what has been a seemingly endless quest by Ryan to satisfy his judgment. The Debtor equates his ability to pay any judgment with his intent to pay any judgment. Although he may have had the means to pay Ryan, he chose to take his name off of the account and began to pay his earnings into an account over which he had no control.

The court took great pains to quote the Debtor's language in certain depositions taken after he removed his name from the account. This was not by accident. The Debtor's intent to hinder, delay, or defraud Ryan was very clear from his language. Now the Debtor wants to quibble over the timing of the statements. As the Debtor points out, it is his intent during the year prior to his bankruptcy which is vital, not his intent at the time of the citation hearings. There cannot be a question that the Debtor had the intent to hinder, delay, or defraud Ryan, both when the citations were taken and during the relevant statutory period.

The Debtor also argues that the proposed settlement with John Gierum, the Trustee of his Chapter 7 case ("Trustee") in which he would waive his discharge pursuant to § 727(a)(10) as to all of his creditors except Ryan, cannot be used as evidence of his intent to hinder, delay, or defraud Ryan. His logic is that it was an agreement between himself and the Trustee which was

negotiated at arm's length. This he argues, shows that it could not have been formulated with the requisite intent. This was not the only basis on which the court based it decision, and as such, giving the Debtor the benefit of the doubt, the court's opinion would not have been any different if it did not consider the proposed settlement.

The Debtor has failed to meet any of the criteria for reconsideration. Accordingly, the Motion is denied.

ENTERED:

Date: June 8, 2000

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John D. Schwartz
United States Bankruptcy Judge